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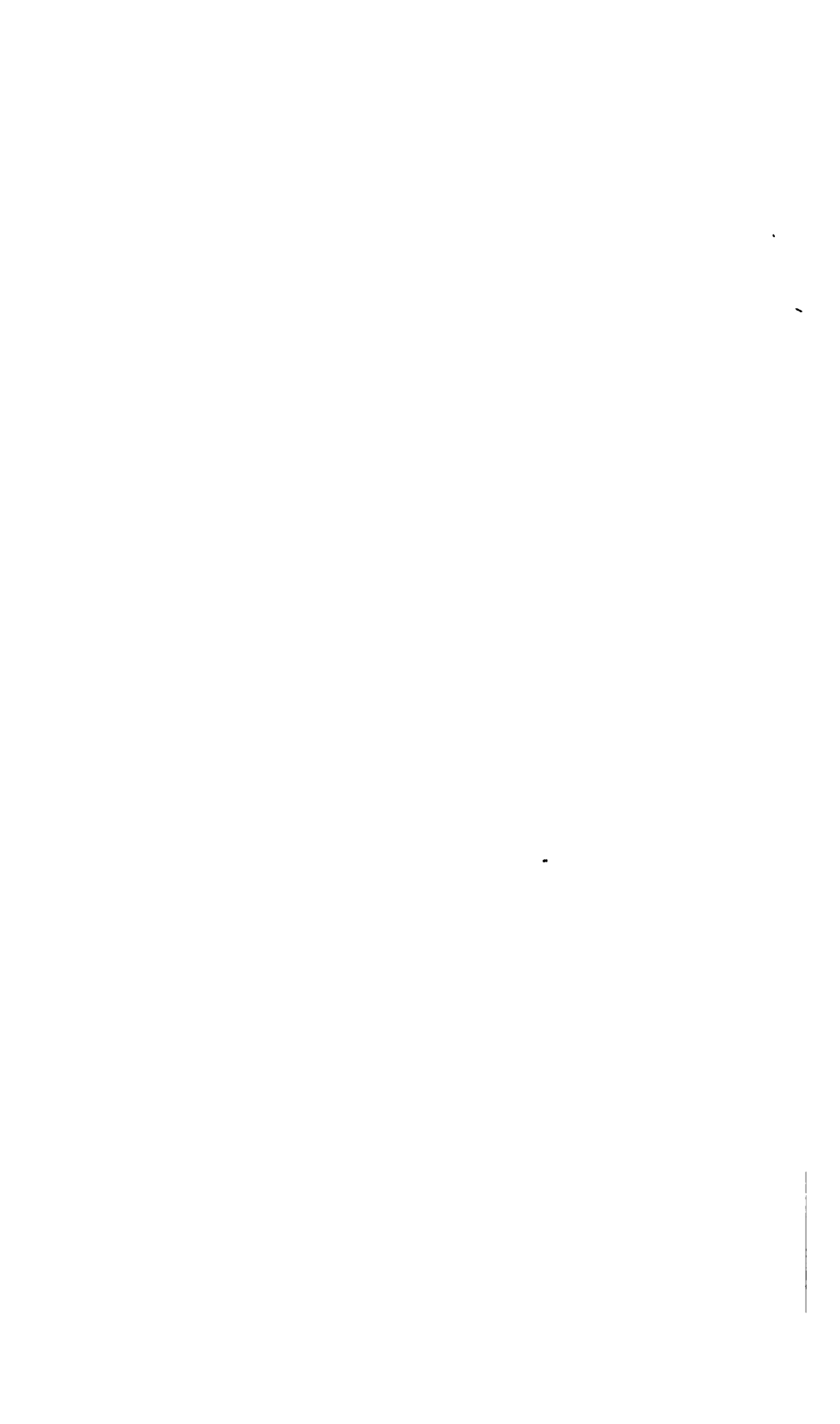
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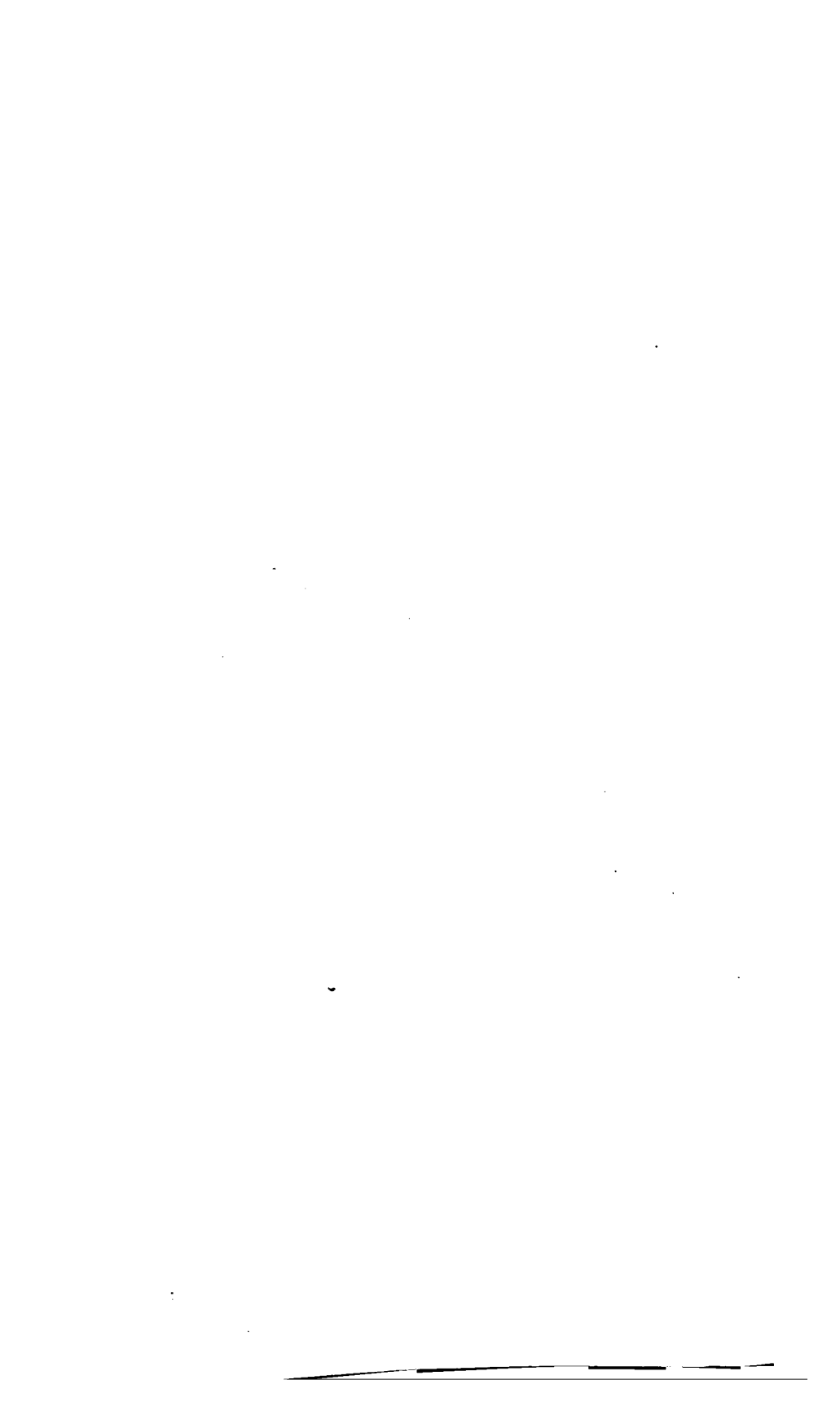
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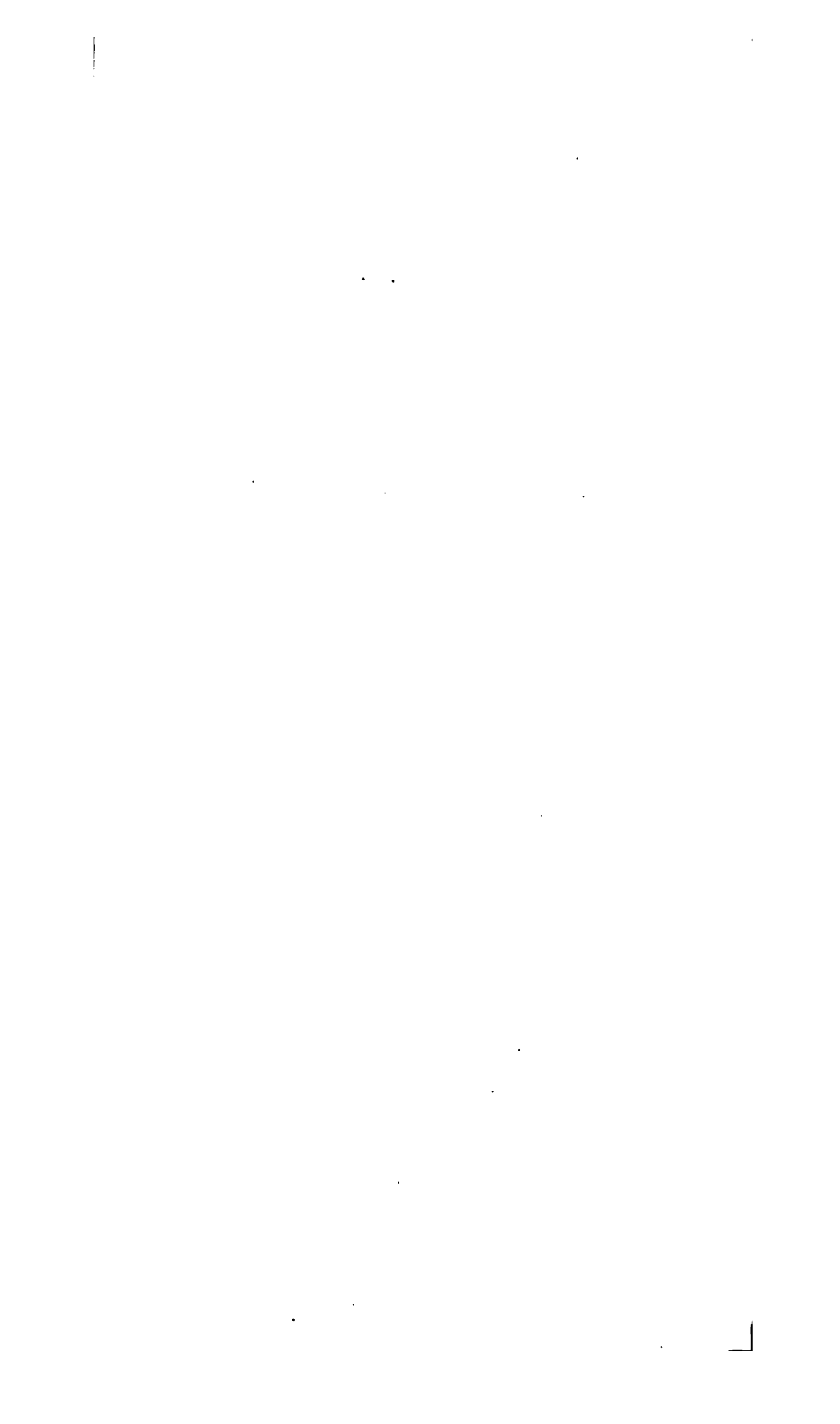
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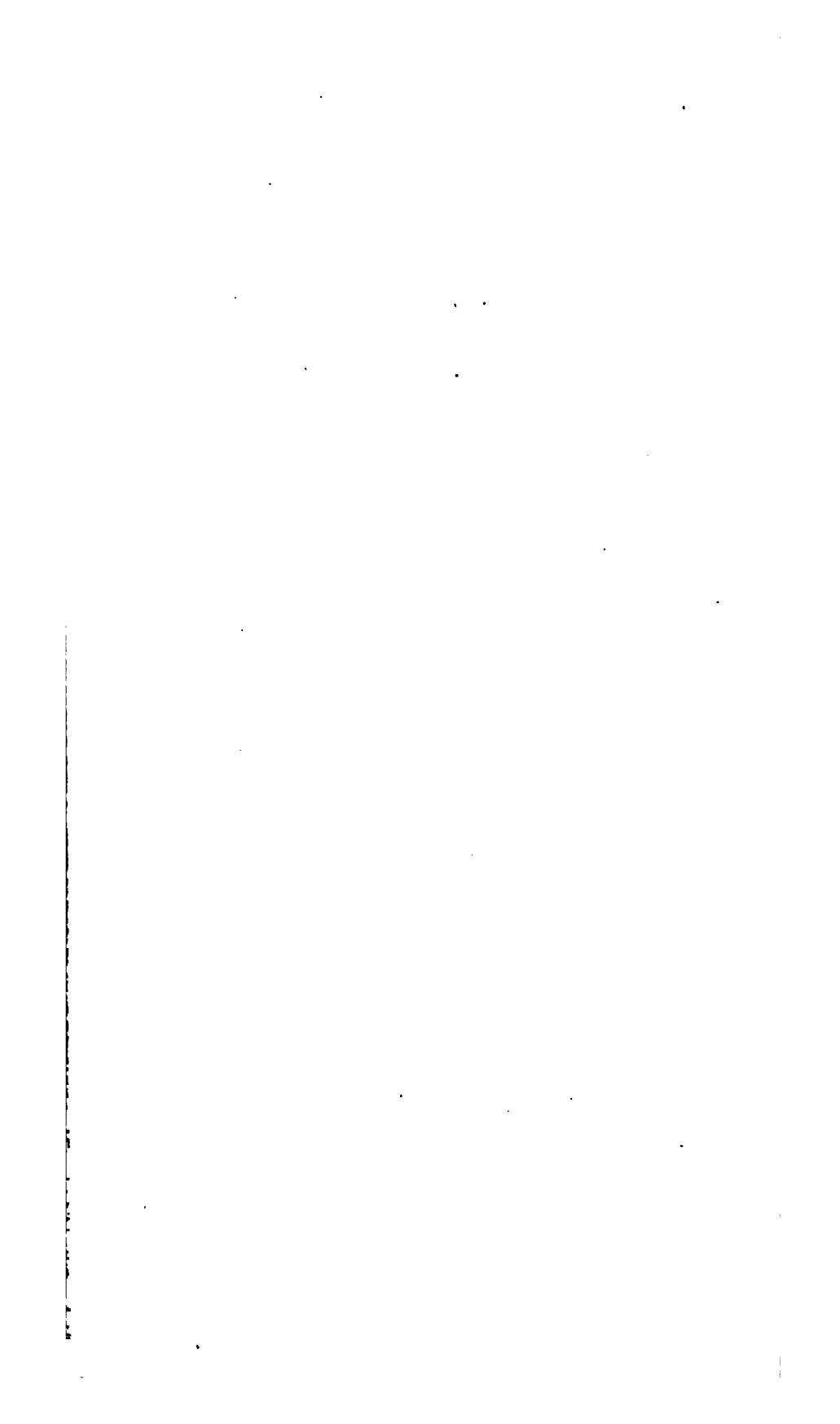
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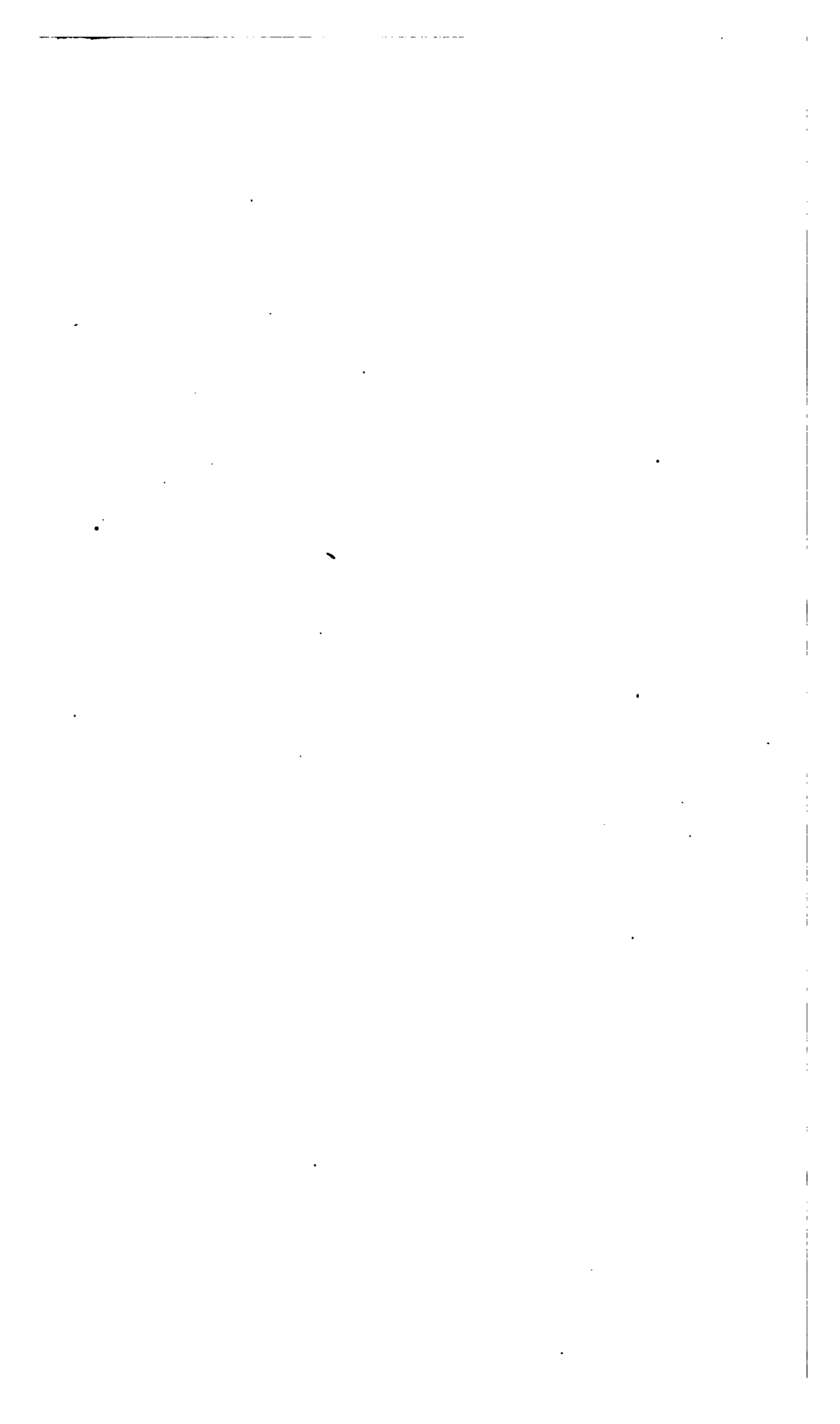














REPORTS

OF

CASES DETERMINED

IN THE

CIRCUIT COURT OF THE UNITED STATES,

FOR THE THIRD CIRCUIT,

COMPRISING

THE DISTRICTS OF PENNSYLVANIA AND NEW-JERSEY.

COMMENCING AT APRIL TERM, 1803.

Published from the Manuscripts of
THE HONOURABLE BUSHROD WASHINGTON,
One of the Associate Justices of the Supreme Court of the United States.

VOLUME II.

PHILADELPHIA:
PHILIP H. NICKLIN, LAW BOOKSELLER.

PRINTED BY LYDIA E. BAILEY.

.....

1827.

EASTERN DISTRICT OF PENNSYLVANIA, to wit:

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D. CALDWELL, *Clerk of the
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CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1807.

BEFORE { Hon. BUSHROD WASHINGTON, Justice of the Supreme Court.
{ Hon. RICHARD PETERS, District Judge.

ROBINSON vs. CLIFFORD.

Insurance. Where a warrant of survey was issued, and a report made thereon, that the vessel was unfit to perform the voyage, and the vessel and cargo were ordered to be sold; the captain cannot be admitted as a witness to prove the condition of the vessel at the time of the survey, and that she was unfit for the voyage. The proceeding was judicial, and the warrant and report must be produced, but the facts contained in the report may be proved by other evidence.

A certificate of the Registrar of the Vice-Admiralty Court was produced, which stated that the warrant was lost. The certificate is not evidence, but the fact of the loss must be proved under a commission.

Written statutes and edicts of foreign countries must be produced; common or unwritten laws may be proved by parol.

THIS was an action brought on a policy, on the profits of a cargo on board ship Mary, at and from Batavia to New-York, on the voyage insured. The vessel having met with severe weather, by which she received considerable injury, the captain, with the approbation of his officers and crew, bore away for the West Indies, and was captured on his way thither by a British cruiser, and carried into St. Christopher's, libelled and

VOL. II. A

acquitted. Upon the application of the captain to the Court of Admiralty for a warrant of survey of the vessel, one was granted. A survey and report were made, condemning the vessel as unfit to prosecute the voyage with her cargo; in consequence of which, both ship and cargo were sold at a considerable profit, unless a charge of a large sum for money lost on bills of exchange taken in payment, should be admitted as part of the loss.

To prove the condition of the vessel at St. Christopher's, and that she was reported unfit for the voyage; the evidence of the captain was relied upon, and objected to.

By the Court. This was a judicial proceeding, and in writing. The warrant and report must be produced, if you mean to rely upon them as a justification for breaking up the voyage at St. Christopher's. Parol evidence of their contents is inadmissible. But the facts contained in the report may, nevertheless, be proved by other testimony than the report.

The counsel for the plaintiff then produced a certificate from the Register of the Vice Court of Admiralty, where the proceedings took place, stating that the warrant was lost.

By the Court. The proof of the loss is not properly made out. It should have been established under a commission, in the usual manner of proving other facts, and not by the certificate of the clerk. The captain, in his deposition, stated, that, according to the law of St. Christopher's, no other vessel could have been permitted to bring away the cargo.

This was objected to, as the law itself should have been produced.

By the Court. The statute or written law of foreign countries, should be proved by the law itself, as written. The common customary or unwritten law, may be proved by witnesses acquainted with the law. In this case, it does not appear whether the law alluded to by the witness, was written or unwritten. From the very nature of it, I presume it to be the former. The prohibition of other vessels to carry away a cargo situated

Robinson vs. Clifford.

as this was, would naturally be a subject of positive municipal law, from political or other considerations of state.

Mr. Tilghman having inquired of the Judges, before the above question was decided, but after it had been argued, whether they would allow the item in his account of a loss on protested bills, to go to the jury, without proof; and being answered, that, as soon as he should arrive at that item in his account, he would be called upon to prove it, or the jury would be instructed to disregard it; he consented to be nonsuited, saying that he had no proof of it, and that if that item were struck off the account, he acknowledged no loss had been sustained.

Delaware Insurance Company *vs.* Hogan.

DELAWARE INSURANCE COMPANY *vs.* HOGAN.

Insurance. If it appear that the terms of the order had been departed from in the policy of insurance, by fraud or mistake, the Court would consider the order as containing the contract between the parties; as where it materially varied from the policy; as if the risk stated in the policy be *from* such a place, instead of *at* and *from*; or if it contain a warranty not authorized by the order. In such cases, the variance itself, unless contradicted by proof, would be evidence of mistake. But in such cases, the order could only be resorted to so far as it varied from the policy, and in all other respects the policy would govern,

THIS bill states no new matter,* except that the defendant intended to insure according to the order, and calls upon the defendant to declare, if this was not his intention; that is, that the policy effected here was to be void, if a policy were done in England after as well as before this. The defendant denies that this was his intention.

For the complainants it was contended, that the order was the only evidence of the contract, and that the Court ought to consider the case as if the very words of the order had been inserted in the policy. 1 Atk. 545. 1 Vez. 318, 319. If so, the construction contended for as law, and which the Court seemed inclined to favour, must prevail.

For the defendant. The case is stronger now for the defendant than it was at law; for the defendant swears, that the policy conforms to his intentions. To get at the intention of the parties, so as to discover whether a mistake was made, the order, instruction, and policy must be considered together. If so, there can be no doubt. The policy cannot be departed

* See, for this case, Vol. I. page 419.

Delaware Insurance Company *vs.* Hogan.

from, unless fraud or mistake is clearly made out. Marsh. 245-6. Park, 1.

WASHINGTON, Justice, delivered the opinion of the Court. When this case was decided on the law side of the Court, the whole question was taken into consideration; every thing being viewed as done, which a Court of Equity could properly have directed to be done. The true question was then, and still is, what was the agreement between these parties? The argument urged upon the former occasion, and again repeated, was, that the order alone constituted the agreement. What then is the use of the policy? If it be not evidence of the contract finally concluded upon, it must be considered as a superfluous document, unnecessarily executed, and improperly introduced into a cause. The order contains the heads of the agreement for the information of the party, who is afterwards to give it its proper form. The form, which it finally assumes, is that of an instrument, denominated a policy; which is signed by the underwriter, and is the evidence of the contract of indemnity, as understood by him and the assured.

It may and certainly often does happen, that the terms of the order are departed from by consent, by fraud, or by mistake. If by consent, no person will contend that the order should control the policy; and if by fraud or mistake, then the order may be resorted to where it *materially* varies from the policy, because in reality, that would be the only true evidence of the agreement upon the point of variance. I say *materially variant*, as if the risk, stated in the policy, be *from* such a place, instead of *at and from*; as in the case of *Mitteaux vs. The London Insurance Company*. So if it contain a warranty which is not authorized by the order, and the like; and in such cases, the variance itself between the two instruments, would, without contradictory proof, be evidence of the mistake. But still, the order could only be resorted to so far as it varied from

Delaware Insurance Company vs. Hogan.

the policy; and, in all other respects, the policy would be considered as the contract.

But a previous question must always be, is there a variance? and to ascertain this, the whole evidence must be considered. The whole must be taken and construed together; the letter of instructions, the order, and the policy. It is from these together, with any other evidence which may be produced, that the real intention of the parties is to be discovered; and whether this intention has, by fraud or mistake, been frustrated by any expressions used in the policy. This brings us to the true point in this cause: does it appear, from the whole evidence, that the policy misstates the contract intended by the parties? The letter of instructions and the order afford no evidence that the intention of the parties was mistaken; because they are expressed in such ambiguous terms, it may well be doubted, whether the clause now complained of, refers to a prior, or to a subsequent insurance effected in London. The defendants, in their answer, swear that the policy states the contract as they intended it, and there is no evidence in the cause to show that it contradicts the intention of the complainants. Why then should the words of the order be substituted for those of the policy? Not because the latter has mistaken the intention of the parties, for the reverse of this appears to be the fact,—not for the purpose of explaining a doubtful meaning, for it is the order alone which creates a doubt.

If further observations be necessary to render this case clearer, let it be noticed, that the addition to the order, and the insertion of the clause in the policy which is now objected to, were made by the party who now asks relief; and that the policy remained with him, without a suggestion being made that it was repugnant to the real agreement of the parties, until after the catastrophe had occurred, upon which his obligation to indemnify the other party had become complete. All the principles of law and of equity are against him.

Bilk dismissed with costs.

Winthrop vs. Union Insurance Company.

WINTHROP vs. UNION INSURANCE COMPANY.

Action on a policy of insurance on goods on board the ship *Maryland*, at and from New-York to the Cape of Good Hope, with liberty to proceed to, and trade at the Isle of France, and any other port or ports in the Indian seas, and at and from the ports she might go to, back to New-York; with liberty to touch and trade, as usual, on the outward and homeward voyages, for refreshments.

The vessel touched at the Isle of France, thence to Trincomala, proceeded to Madras and sold part of her cargo, and went from thence to Tranquebar, where she took in goods and proceeded to Batavia; there she sold the remains of her original cargo, as well as the goods taken in at Tranquebar, and sailed from Batavia with a cargo purchased with the proceeds of her outward cargo, and of the goods taken on board at Tranquebar. After leaving Batavia, all the officers died; and before his death, the captain directed one of the seamen, who was ignorant of navigation, to take the ship to the Isle of France, and deliver her to the consul. She arrived there, and was despatched for New-York, under the command of a British subject, but was lost on the voyage.

Held, that the trading was within the terms of the policy. That the proceeding to the Isle of France, was not a deviation. That the acts of the consul, if irregular, could not prejudice the rights of the insured.

Evidence of a usage to explain some clause in the contract of insurance, is regular; but it can only be resorted to when the law is unsettled, and then the construction must be determined by the usage, and not by the opinions of witnesses.

Depositions taken under a commission, issued to a place where the commissioners are prohibited executing the commission, taken according to the law of the place, in the presence of the commissioners, by the Judge, may be read in evidence. If all the interrogatories, either in form or substance, are not put to the witnesses, the evidence cannot be read.

It is no objection to reading a deposition taken abroad, that the witnesses had previously been examined and cross-examined under a commission in the United States.

The protest of some of the crew, taken at the Isle of France, was permitted to be read, to invalidate their evidence under a commission.

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ACTION on a policy, of the 4th of January 1804, entered into by the Union Insurance Company, on goods on board the *Maryland*, lost or not lost, at and from New-York to the Cape of Good Hope, with liberty to proceed to, and trade at the Isle of France, and any other port or ports in the Indian seas, and at and from the ports she might go to, back to New-York; with liberty to touch and trade, as usual, for refreshments, on the outward and homeward voyage. The policy was open, and 20,000 dollars were insured. The ship sailed from New-York, on the voyage, about the latter end of December 1803, and touched at the Cape of Good Hope; whence she departed, and touched at the Isle of France, and went thence to Trincomala, in the island of Ceylon. It did not appear that she traded at any of the above ports. From Trincomala, she went to Madras, where she sold a part of her cargo, and received in return an order on Tranquebar, a Danish port on the Coromandel coast, where she took in goods purchased with the above order, and then proceeded to Batavia; there she sold the residue of her American cargo, as well as that part taken in at Tranquebar, and invested the proceeds in a return cargo, and about 10,000 dollars in specie, on account of the plaintiff, and 4000 dollars belonging to the captain.

The crew were generally sick at Batavia, and the first officer died there, or shortly after she sailed on her return voyage. Before the ship had left the Straits of Sunda, the second officer, in a state of delirium, shot the master, captain Wickham; and shortly after died. The master appointed an officer in his room, and being himself seized with a lock-jaw, and sensible of his danger, he called to him one of the seamen, Beardsley, a young man on board, and asked him if he could lay the ship's course for the Isle of France; and being answered in the affirmative, he directed him to conduct her to that island, and deliver her to the American consul at that place. The master shortly after died, before the ship had cleared the Straits, and before

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any course had been laid. A council of the crew being called; they determined, in their situation, that it was best to go to the Isle of France; and, accordingly, Beardsley conducted her there in safety, and delivered her to Mr. Buchanan, the American consul. Mr. Sauliera, (the correspondent of the plaintiff, and to whom the captain, who was also the sole consignee, was recommended by his owner, in case he should want his assistance on the outward voyage,) claimed the right of taking the vessel and cargo; which, being resisted by Buchanan, the American consul, the question was brought before the Court of Admiralty of the island, where the possession and management of the vessel was decreed in favour of Buchanan. Buchanan obtained an order of the Court for a survey of the vessel, and either upon the report made by the surveyors, or for some other reason, he thought the vessel was overloaded; and in order to lighten her, he sold a part of her cargo of sugar, and invested the proceeds, as well as the 14,000 dollars, and about 1600 dollars received from passengers, in a lighter load, consisting of indigo, &c. He employed ~~as~~ Mr. Adamson, a British subject, then in the island, to command and navigate the ship to New-York; and permitted some Englishmen, who had been prisoners in the island, to take their passage in the ship to New-York. The ship sailed from the Isle of France, and was lost on the American coast, within a day's sail of New-York. On notice of loss, a regular abandonment was made. The property of the plaintiff was admitted.

One of the objections made by the defendants to paying the loss when the abandonment was made, was, that the ship when she left Batavia, was overloaded. But this was so clearly disproved by the evidence in the cause, that it was abandoned on the trial.

A number of depositions were taken and read, proving the facts above stated, which are noticed in the charge. The protest of Beardsley, and of most of the witnesses who have deposed in the cause, was read to discredit their testimony, as to

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the intention of captain Wickham when he left Batavia, to call at the Isle of France.

The defendants offered to prove by witnesses, a usage, in voyages like the present, which prevented the selling on board of any part of the cargo at any intermediate port, at which the vessel was permitted to call. To prove that such evidence was proper, were cited Park, 30. 42. 45. 49. Johnson's Rep. 333. The admission of the evidence was opposed by the plaintiff's counsel.

By the Court. An usage to explain some clause in a policy, is proper. If the construction be doubtful, it is the safest guide, because most likely to accord with the intention of the parties; who, it is to be presumed, had a view to the usage when they contracted. But usage can only be resorted to where the law is doubtful and unsettled; and even then the construction must be determined by the usage, and not by the opinions of the witnesses, however respectable they may be. In this case, the usage which the defendant expects to prove, will not contradict, though it may qualify and explain the permission which is granted by trading at the ports in the Indian seas; and it will contradict no settled principle of law on that subject. The evidence, therefore, is proper.

Witnesses were then examined who stated, that where the termination of the voyage was fixed, the permission to trade was, according to usage, confined to ports in the line of the voyage; but where this was not the case, as in the present instance, the trading might be backwards and forwards, out of the line. They mentioned two cases, where the policies resembled the present, except that the insurances were upon time, and a trading, similar to that which took place in this case, was carried on, and not objected to; and concluded, generally, by saying, that such a trading, in such a voyage, and under such a policy, is considered lawful, within the general usage of trade.

The defendant's counsel then offered to read depositions,

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taken under a commission to the Isle of France, which was opposed upon two grounds: first, that it was executed not by the commissioners named, but by the Judge of the Admiralty, or some tribunal of that nature in the island: second, that many of the interrogatories were not put to the witnesses, neither were they answered. As to the first objection, it appeared that the execution of a foreign commission at that place by individuals, was considered by the government as an assumption of sovereign power, which was not permitted to be exercised. The American consul, to whose management this business was entrusted, in pursuance of the advice of counsel, petitioned the Judge of the Court to execute the commission, which he did with great solemnity, in the presence of persons named in the commission; but the interrogatories were not all put in the form they were propounded by the counsel in this country, and some of them were not put at all.

In support of the commission, it was argued that this was the best evidence, which, from the nature of the case, could be produced; and if it be rejected, it will be impossible, in this or any other case, to obtain testimony where the witnesses reside in any part of the French dominions. In the cases of *Church and Hubbard*, 2 Cra. 236, it was decided, that foreign laws must be proved like other matters of fact; but that, if such proof was unattainable, inferior evidence, even the certificates of a consul, might be admitted. As to the second objection, the interrogatories are informally put; yet, if they are substantially answered, it ought to be deemed sufficient; particularly in a case where the execution of the commission was taken from the persons named in it, by the imperious interference of a foreign power.

Washington, Justice, was of opinion, that the first objection ought not to prevail. The object of Courts is, that the administration of justice should not be impeded by difficulties of form. The substantial purpose for which a commission to examine witnesses is given, is to obtain the evidence of those witnesses

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fairly, fully, and impartially. The commission, the interrogatories, &c. constitute the form by which this purpose is to be effected. If the substance be obtained, but from imperious circumstances not controllable by the Court, the form cannot be observed; a correspondent relaxation is proper, in order to prevent the course of justice from being impeded. Upon this ground, which is rendered tenable by the general principles of law, the first objection ought to be overruled. A contrary decision might be productive of extensive mischief in commercial questions. But, whilst the form in which the commission is executed, may, in a case like the present, be disregarded; it is, nevertheless, the duty of the Court to see that the evidence has been fully and fairly taken. If the interrogatories be substantially put, though not in the precise form in which they are propounded by the parties; and if it appear that they are answered by the witnesses, it will be sufficient. But they ought all to be put, and should be all answered; as well those of the one side, as those of the other. This is not the case, as to any of the depositions under this commission. To mention one instance, among many others, which might be selected from the commission. The witness, by a cross-interrogatory, is asked, if the *Maryland* came into the Isle of France from necessity. In answer to some other question, he states, incidentally, that she came in, having lost all her officers; and this is said to be an answer to the above question. But that question was calculated to draw from him every circumstance of necessity within his knowledge, such as stress of weather, leakages, being overloaded, &c. Each party has a right to have full benefit of his interrogatories, and to have them fully answered. This objection, therefore, is conclusive against the depositions.

Judge Peters fully concurred in the opinion upon the last objection, but he was not perfectly satisfied as to the first; although he concurred, rather than divide the Court.

A third objection was made to the reading of *Beardsley's* deposition, taken under this commission, that he had been pre-

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viously examined and cross-examined, under a commission in the United States. But the Court thought this no reason why his second deposition should be rejected.

The protest of Beardsley and some others of the crew, stated, that the Maryland sailed from Batavia *for the Isle of France*, and that they believed this was the intention of Captain Wickham, that he might there dispose of part of the cargo. But in the depositions of the same witnesses, they declared that they did not swear to this protest, and that if it was interpreted to them they did not understand it, and would not have signed it if they had. But the Judge who received the protest, certifies that it was interpreted to the appearers, and sworn to by them.

The counsel for the defendant, Dallas and Rawle, objected to the plaintiff's right of recovery, upon the ground of a deviation committed in *three* instances; 1st, in selling at Madras, buying at Tranquebar, and reselling at Batavia; 2d, in going to the Isle of France; 3d, in breaking bulk, and changing her cargo there. Second; that the policy was vacated by taking on board an English captain at the Isle of France. They cited, in support of the first act of deviation, Lafabre and Wilson, Park, 294. On the third, Park, 309, 310. 313. 2 Mars: 413. Park, 295. Esp. Rep. 610. 3 Idem, 257. 5 Idem, 56. Upon the second point, they relied upon the evidence to prove that she did not touch at the Isle of France from stress of weather, from being overloaded, or from the incapacity of the ship to proceed. The loss of officers was a mere pretence. The captain intended, when he left Batavia, to stop there. On the third point, they insisted that the American consul was to be considered as the agent of the insured, legally substituted as such by the captain, who united in himself the characters of master and consignee. If so, then the changing of the cargo, and taking in an additional cargo purchased with the 14,000 dollars, was clearly a deviation, and was committed by the plaintiff's agent. On the last point, they insisted that the put-

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ting on board an English commander increased the risk, inasmuch as it would, by an ordinance of Louis XV., have made her good prize had she been taken by a French cruiser.

For the plaintiff, these positions were controverted by Tilghman and Ingersoll, particularly as to the facts respecting the second ground of deviation. They denied that the captain had meditated a deviation, and insisted that the American consul was the agent of all the parties concerned.

WASHINGTON, Justice, delivered the charge. The plaintiff has proved every thing necessary to his right of recovery; and the question is, whether by any act, inconsistent with his contract, he has discharged the underwriters from the obligation to indemnify him for the loss which has happened.

The claim is resisted on account of three distinct acts of deviation; first, on the outward voyage, in buying and selling a cargo in the ports at which she was permitted to touch; second, in calling at the Isle of France on her return voyage; and, thirdly, in changing her cargo there, and the taking in a new cargo purchased with the specie brought from Batavia. Another objection is made to the recovery, upon the ground of the risk having been increased by taking on board, at the Isle of France, an English captain to command the ship home.

To understand the first objection under the head of deviation, we must attend to the nature of the voyage insured. What was it? From New-York to the Cape, with liberty to proceed to, and trade at the Isle of France, and thence to any port or ports in the Indian seas; and at and from the ports she might go to, back to New-York, &c. It is contended by the counsel for the defendants, that the permission to trade beyond the Isle of France, is merely constructive, and cannot be more extensive than the express permission to trade at the Isle of France; that though the plaintiff might have touched at as many ports as he pleased, in order to dispose of his outward cargo, yet he could only take in a return cargo at those ports, and had no

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right to dispose of any part of it at any port on the voyage : that a more extensive construction would be highly unreasonable, by prolonging and increasing the risk beyond the time and measure which could properly have been contemplated by the underwriters.

It may be well doubted, whether this increase of risk to the extent supposed, is not in a great degree imaginary. The buying and selling would be nothing more than a change of cargo, and it must always be the interest of the insured to terminate the voyage as soon as possible. But be this as it may, it is always in the power of the insurers to prevent the consequences of a protracted voyage beyond the period they may be willing to insure, by limiting the duration of the risk. Insurances upon time, seem to be peculiarly fitted to trading voyages, and in most cases accompany them. The only two instances mentioned by the witness called to prove an usage, as to voyages like the present, were insurances upon time. It is impossible for the underwriter to calculate the period when a trading voyage will terminate ; and it may, therefore, be prudent for him to say, that he will not take the risk longer than a fixed number of months, &c. But it is unnecessary to consider the extreme case mentioned by the defendant's counsel. It will be more prudent to confine our inquiries to the very case before us. Does the policy protect the selling at Madras ? the investment of the proceeds of that sale in a cargo at Tranquebar, and the resale of it at Batavia ? The first consideration is, do the words of the policy, properly construed by the rules of law, protect such a trading ? If they do, then, secondly, is there any usage of trade which restrains the construction ? First, the permission to trade at the Isle of France, ought, upon every principle of construction, to be carried forward so as to apply to the ports in the Indian seas ; for, otherwise, the permission to go there would be a mere mockery. Indulgences granted by the underwriter, ought to be and certainly are always paid for by the insured : that of going to any port in the Indian

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tion, acted *bona fide*, according to the best of the general benefit of all the parties concerned; the fairness of the measure, it is proper to the end he had in view, and to the end he may err in judgment; the necessity may be extreme; but a necessity or justifiable cause must be satisfactorily proved. His real motive must correspond with the one assigned, or he will furnish a strong ground of suspicion that he has not acted *bona fide*.

The instances of necessity which are generally met with, are stress of weather; injury sustained by the ship, which requires to be repaired; to avoid an enemy; going to join convoy, and the like. But these are only examples, which serve to illustrate the principle. There may be many other instances, where the necessity will be equally great, and equally valid, to excuse the deviation. Our inquiries will then be directed to the following points: What was the asserted object in calling at the Isle of France? Was it the real one?

The first officer on board, then the second, and lastly the captain, all died before the vessel left the Straits of Sunds, and before the vessel's course had been shaped. Upon the death of the first officer, the captain had appointed another; but he seems never to have acted, and we never hear any thing further of him. The captain, previous to his death, but after he was seized with a lock-jaw, and when he was certain of dying in a short time; inquired of Beardsley, a young man, and a common seaman, if he could shape the course of the vessel to the Isle of France. Upon being answered in the affirmative, he directed him to conduct her thither, and deliver her to the American consul. Unless a deviation had been previously meditated by the captain, it is strongly to be inferred from his conduct on this occasion, that he thought Beardsley the most competent of the crew to navigate the vessel; but yet, that he had not sufficient confidence in his skill, to entrust him with the command further than the Isle of France, which was not much more than

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half the distance they had to run to the Cape of Good Hope. This opinion of the captain seems to have been confirmed by that of the crew, who, in a council called after the melancholy fate of the captain, determined, that in their situation, it was proper to go to the Isle of France. One of the witnesses has deposed, that if the crew had not been extremely good, he doubted if Beardsley could have conducted the vessel even to the Isle of France.

This, then, was the situation of the vessel. What was the end proposed by going to the Isle of France? If the witnesses are to be believed, it was to be relieved from the danger to which the vessel and crew were exposed, by the unfortunate loss of all the officers who could be depended upon. But was this the real purpose for going there? It is denied by the defendant's counsel, who contend that it was a mere pretext to conceal a previously formed plan of captain Wickham, to go from Batavia to the Isle of France. If this should be made out to your satisfaction, it will be difficult to give credit to the necessity resulting from the loss of officers, which is assigned as an excuse for the deviation.

The evidence relied upon by the defendant is; first, a letter from the American consul to the plaintiff, in which he states, as coming from Beardsley, that the vessel had come in on her voyage from Batavia to that island, in consequence of her being overloaded. It is strange that Beardsley should have assigned that as a reason, when it is admitted on all hands that she was not overloaded; and Beardsley, in his deposition, declared that he never heard of an intention to go to the Isle of France from any of the officers, and that she was not overloaded. Second; the reports of the persons appointed at the Isle of France to inspect the vessel, who state that she required repair and lightening. This, however, is strongly opposed by other evidence taken in the cause. Third; a letter from Adamson to the plaintiff, after the loss, in which he states that the vessel sailed from Batavia to the Isle of France. But it is to be re-

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marked, that Adamson was picked up at the Isle of France, after the arrival of the vessel; and, therefore, could not have known any thing which had previously taken place. Fourth; the journal of Beardsley, which is headed, "Journal of a voyage from Batavia to the Isle of France." You will judge what weight ought to be given to this evidence. Lastly, the protest of Beardsley, and of some of the crew, made at the Isle of France.

On this evidence it is proper to remark, that the Court allowed it to be read for the purpose of discrediting the witnesses who had signed the protest, and given evidence in the cause; but not to establish any one fact. If it has the effect for which it was permitted to be read, then you will consider whether there is evidence sufficient, without the depositions of those persons, to prove the case, and to justify the motives of the deviation; but not whether the protest establishes the contrary; and in presenting this inquiry, it may be proper to attend to what all these witnesses have deposed; that they did not understand the paper as it was interpreted to them; if they had, they would not have signed it. Though I should be very cautious in crediting such testimony, in contradiction of the certificate of a foreign competent consul; yet the certificate, in this case, goes no farther than to say that the protest was interpreted and sworn to, which might be, and yet might not have been understood.

On the other side, you have heard the following evidence: first, two letters from captain Wickham shortly before he left Batavia, in which he speaks of sailing on his return to New-York, and to touch at the Cape of Good Hope, in order to settle some business there. Whether he could have any motive to conceal from his owners his intent to go to the Isle of France, if he entertained it, you must judge. Second; the evidence of Beardsley, of the boatswain, and of one of the crew; who depose that they never heard of any intention to touch at the Isle of France, until after the captain was sick,

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and sensible of his danger. The boatswain states, that he was told by the captain and mates that they were to return to New-York, and to touch at the Cape. These witnesses, as well as captain Lacher, give the reasons for their belief, that the Isle of France was not in the contemplation of captain Wickham. But what seems most strongly to corroborate the evidence of these witnesses, is the order given by Wickham to Beardsley, shortly before his death. The diffidence he manifestly indicated of Beardsley's skill to navigate the vessel, even as far as the Isle of France; his directions to deliver her, not to Mr. Sauliera, the correspondent of his owners, but to the *American consul*; not by name, for probably he knew neither his name nor character, but as distinguished by his official station, as the commercial agent of the United States; without a single direction what this public character was to do, after he had received possession. These circumstances seem strongly to persuade the mind, that the order to deviate grew out of the necessity of the case, and could not be the result of any previously formed intention. As to this, however, you are the proper judges.

Third; the changing of, and adding to the cargo at the Isle of France; trading, except for refreshments, not being permitted on the homeward voyage. The changing of the cargo was sufficient to avoid the policy, if, under the circumstances of the case, it were imputable to the plaintiff. The reason is, not that the risk insured is *increased*, but that it is not the risk insured; and, therefore, it could be no excuse to say that the load was lightened by the change. If a necessity exist to throw over-board, or to land a part of the cargo, the act of doing so may be excused; but, in this case, there is no evidence of any necessity to lighten the vessel. She is proved to have been tight, and fit to perform any voyage.

The next inquiry is, were the transactions at the Isle of France imputable to the insured? Was the result varied by the act of any person representing him, and acting, constructively, as his agent? The affirmative is asserted by the defend-

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ants. Or did they result from a misfortune occurring in the voyage, which, for a time, took the property out of his possession, and afforded an occasion for the interference of a third person, acting for the benefit of all concerned. This is contended for on the part of the plaintiff.

This is a question, which, in point of law, presents the greatest difficulty in the cause. Let us go by steps. Had captain Wickham lived, and done these things, the defendants would have been discharged. Had he authorized or permitted the American consul or any other person to do them, the consequences would have been the same. Had Beardsley been appointed by captain Wickham his successor, generally, and had he done, authorized, or permitted the doing of these things, still the policy would have been avoided.

But who was Beardsley, and what were his powers? He was a sailor, taken from the crew of the vessel, clothed by the captain with a limited authority to conduct the vessel to the Isle of France, and there to deliver her and the cargo to the American consul. The moment he executed this order, all his authority ceased, and he returned to his former situation of a common seaman. He gave and could give no power or authority whatever to the American consul.

Who was Buchannan? Not the consignee or agent of the owners, either so appointed by them, or by the substitution of the captain; who was, whilst living, both master and consignee. The captain clothed him with no special powers whatever; and if he possessed any, they were such as flowed from the necessity of the case, and from his official character as the commercial agent of the country he represented, and to which the vessel belonged. The vessel came to the Isle of France in distress—if you think, from the evidence, there existed a necessity strong enough to justify her going there; and, in such a situation, as required the American consul to take care of the vessel and cargo, and to afford his assistance to both. Wickham gave no directions to that officer; and, therefore, seems to have

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had nothing in view, but to call upon him to perform his duty as consul. He is no more to be considered as the agent of the plaintiff, than he would have been had the captain died without giving a direction, or if she had floated into the Isle of France, without officers, or without a crew. In addition to the circumstances of the case which threw her under his care, he states that he acted for the benefit of all concerned, and he acted too under the sentence of a competent tribunal, who vested him with the possession of the property.

The question of law, then, upon this point is, is the insured responsible for the conduct of third persons, done in consequence of a misfortune occurring in the voyage, from which misfortune alone, and not from any act of the owner or his agents, such third persons derived their power to interfere? The Court is of opinion that he is not.

The decision of this point settles the only remaining one, the putting an English captain on board. Let this have been right or wrong, it was not the act of the assured, expressly or constructively.

To conclude. The first question is purely a question of law; as the defendant admits, that an usage, such as was stated in the opening, is not proved, and the law is in favour of the plaintiff.

The second is a mixed question of law and fact. If you are of opinion, upon the whole of the evidence, that the going to the Isle of France was a measure of necessity, produced by the loss of officers; that the captain, who gave the order, and Beardsley, who executed it, acting according to their best judgment; were actuated by honest motives to promote the general benefit of all concerned, and did not assign this motive as a mere cover to a previously formed plan to go there; then this point is also in favour of the plaintiff; if your opinion upon the evidence should be otherwise, then it is in favour of the defendant.

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If your sense of the evidence upon the second point should be in favour of the plaintiff, and that the authority given to Beardsley was such as I have considered it, then the next question, in point of law, is also with the plaintiff.

The Jury found a verdict for the plaintiff, the full amount of his demand.

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If a bill of exchange be taken in payment, as a discharge of a pre-existent debt, or in such manner as imports an intention of the creditor to take the risk of the bill on himself, the original debt is thereby discharged.

When the law upon a particular subject is settled, proof of a contrary usage cannot be admitted; such evidence being only allowed in doubtful cases.

If a bill of exchange is remitted, with a special endorsement, in payment of a previous debt which it was meant to discharge, the special endorsement does not restrain the rights of the endorsee on the drawer or on any previous endorser; whatever may be the effect of such endorsement between the creditor and his endorser. What will be due notice of non-payment of a bill of exchange.

The holder of a bill of exchange protested for non-payment, is not obliged to sue any one of the parties of the bill, in order to strengthen his claim on other parties. He may sue or not, as he chooses.

THIS case, in which a new trial was awarded at the last term,* was now tried, and the only question was, as to the claims upon the bill of exchange, or for the original debt for which it was endorsed, and differed only from that case, as to the evidence that notice of non-acceptance was now proved.

The arguments of the defendant's counsel were; that the plaintiff acted and could only act as the agent of the defendant, and that it was his duty, immediately on the bill being protested, to deliver it to the defendant. That the attempt to get the principal and damages from the drawer in the first instance, passing by the endorser, discharged the endorser from his responsibility to pay the original debt; and that he never was liable to be sued, on this special endorsement, on the bill itself,

* Vol. I. p. 512.

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because no interest whatever passed to him by the endorsement. That the damages, if they had been paid by the drawer, would, under the decisions in this state, have belonged to the defendant. They also contended, that the notice given to the defendant on the 11th was too late. They cited the following cases: 2 Dall. 100. 1 Idem, 261. 4 Idem, 153. 1 Term Rep. 167. What is due notice is a matter of fact. 6 East. 14. 16. That it is not necessary for the defendant to prove special damage to have arisen from want of notice. The Court informed the counsel that they need not read cases to prove that.

It was said that if a bill be taken in payment of a pre-existing debt, such debt is discharged, though the bill is not paid.

Washington. If taken in payment as a discharge of a pre-existing debt, or in such a manner as imports an intention in the endorsee to take the risk of the bill upon himself, it is such a discharge.

The defendant offered witnesses to prove a custom, that in the trade between this country and England, the English merchant receiving a bill endorsed as this is, must return it immediately on protest to the endorser; that if he call on the drawer for payment, he exonerates the endorser. This being objected to, the counsel in support of the evidence, cited 4 Dall. 156. 2 Idem, 148. 1 Ld. Ray. 743. 3 Burr. 1675. Hard. 456. 2 Dall. 135. On the other side were cited, 3 Burr. 1337. 1 Ld. Ray. 448. Salk. 199, 177.

By the Court. The cause seems to turn upon the right of the plaintiff to recover as the holder of this bill; and the law upon this subject is settled. It would, therefore, be improper to let a contrary usage be proved, which is only proper in doubtful cases. The case might be different, if the plaintiff were to be considered as a mere agent. We shall, therefore, overrule the evidence; but as the question is stated to be of great and general consequence, and the establishment of the

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custom is deemed highly interesting to commercial men, the Court will hear a motion for a new trial, should the verdict be for the plaintiff; when the question can receive a more sedate consideration.

The plaintiff's counsel, on the main question, contended that the plaintiff claimed, as holder of the bill, for a valuable consideration, and might sue the drawer or the endorser, or both; and that calling on the drawer did not discharge the endorser. That notice on the 11th, was sufficient.

WASHINGTON, Justice. It is admitted that the defendant was once indebted to the plaintiff, to the amount of the sum demanded; that he endorsed this bill with a view to discharge that debt; that neither the original debt nor this bill has been paid: and yet by some legal légerdemain we are told the plaintiff has lost his remedy, and that the defendant is discharged from the original debt, and from any claim on the bill. It is possible the unreasonableness of such a doctrine may mislead the Court, and prevent them from appreciating the arguments urged in its support.

The mistake of the defendant's counsel seems to arise from their considering the plaintiff as the mere agent or collector of the defendant. And clearly if this had been the case, their doctrine that the plaintiff cannot recover on the bill, would have been sound. An agent, acting under a naked authority, acquires no rights, and can do no acts, but such as are within the scope of his authority. It is certainly an act of prudence, when a bill is remitted to an agent for collection, to restrain the negotiability of the bill, and to notify the world that the endorsee has paid no value for the bill, and that he acts as agent. A blank, or full endorsement, imports that the endorsee or holder took the bill, with all the negotiable qualities belonging to the nature of the instrument; and any person receiving such a bill, may recover the amount from the endorser, if the bill be dishonoured, contrary to his intentions. But if he knows the

Brown vs. Jackson.

negotiability of the bill by endorsing it to the endorsee *only*, or to the use of the endorser, or uses any other expressions of like import; whoever takes the bill afterwards, takes it with every restriction and qualification which attended it; and as this agent had no interest in the bill, his endorsement can give none. But if, in fact, the endorser has an authority coupled with an interest; if the bill be endorsed for a valuable consideration, or paid on account of a pre-existing debt which the bill is intended to pay, the endorsee, taking it with the restricted endorsement, possesses all the rights of a general endorsee as between him and the endorser; however it might be as between him and the drawer, and either of the parties to the bill; as to which it is unnecessary to give any opinion.

Now in this case, the defendant, in the letter which enclosed this bill, acknowledges the receipt of certain goods to the amount of this bill, and states that the bill is remitted for the purpose of paying that account. The bill was, therefore, sent in payment of a pre-existing debt. The plaintiff was not bound to receive it as such, though he might do so if he pleased, for whether it was paid by the drawee, or by the drawer or endorser, was of no consequence to the endorser. If it proved unproductive, the endorser was liable upon the original demand; if the bill was returned; and if not returned, he was liable for no more upon the bill; for we are clearly of opinion, that the intention of the endorsement, and the true construction of it, imported that in case the bill was dishonoured, the endorser was to be discharged from the extra damages. Did the plaintiff take this bill in payment? His conduct proves that he did. Instead of returning it to the endorsee, his agent demanded payment of principal, and damages from the drawer, and also from the defendant upon this last demand. What was the conduct of the defendant? He did not reclaim the bill, but offered to pay the principal and interest, which would have been agreed to by the plaintiff's agent, if the time proposed for payment had not been too long. Here then we have the

 Brown vs. Jackson.

language of the defendant, and the conduct of himself and of the plaintiff, to prove that this bill was given and received in discharge of the original debt. If so, the plaintiff is like any common holder of a bill, and was entitled to sue the drawer and endorser. It is admitted by the defendant's counsel, that he acquired by the endorsement a legal right, and, as a trustee, might have sued on the bill. If so, let me ask where is the equitable title, if it is not in him who has paid the full value for the bill? And if both law and equity be united in the plaintiff, where is there a remaining doubt or question in the cause, if the plaintiff's right has not been defeated by his own negligence? It is plain that the plaintiff might have sued the drawer, and might have recovered both the principal and damages; but whether the damages would be considered to the use of the endorser, the Court will not determine. Had the defendant, upon the return of the bill, been insolvent instead of the drawer, could it have been pretended that the plaintiff would have been obliged to deliver up the bill, and thus surrender the additional security which he had acquired? We think not. If then the plaintiff has a right to sue as holder of the bill, the only remaining question is, whether due notice of the protest was given? And this the Court considers as a question of fact, proper to be submitted to the jury. If you think that the giving notice to the drawer on the 10th, and to the defendant on the 11th, was in due time, then the silence of the plaintiff's agent from the 11th to the 19th, will not discharge the defendant. For after giving due notice to the drawer and indorser, if the latter wishes to secure himself in time by resorting to the drawer, he may do so by paying the bill. The holder is not obliged to sue the drawer, unless he chooses to do so.

The Jury found a verdict for the plaintiff for the principal and interest of the bill.

The United States vs. White.

THE UNITED STATES vs. WHITE.

In the incipient stage of a prosecution, the Judge may examine witnesses for the defendant, who were present at the time the offence is charged to have been committed, for the purpose of explaining the testimony of the witnesses for the United States; and the witnesses for the prosecution may be cross-examined.

Witnesses for the defendant are never sent to the grand jury, but by the consent of the prosecution.

THE defendant was bound to appear at this Court on a recognizance taken before a Judge of the state of Pennsylvania, to answer a charge of preparing and setting on foot an expedition against the territories of Spain. The witnesses for the United States not being present, Dallas, District Attorney, moved to bind the defendant over to appear at the next Court to answer the charge. He read some affidavits to prove that the defendant had applied to some persons at two different times, to engage in the expedition under colonel Burr, and that he gave them papers, bearing the resemblance of, and which the witness believed to be, bank notes.

M'Keon, for the defendant, offered to read affidavits, and also to cross-examine one of the witnesses, who had deposed in favour of the United States, to prove that the proposal alluded to was made and understood to be in jest.

Mr. Dallas opposed any examination of testimony for the defendant in this stage of the proceedings, as being unusual and improper.

The Court said, that generally speaking, the defendant's witnesses are not examined upon an application to bind him over to answer upon a criminal charge. The defendant's witnesses are never sent to the grand jury, except where the

The United States vs. White.

attorney for the prosecution consents thereto. But in this incipient stage of the prosecution, the Judge may examine witnesses who were present at the time when the offence is said to have been committed, to explain what is said by the witnesses for the prosecution; and the cross-examination of the witnesses for the prosecution, is certainly improper.

The affidavits were accordingly read, but they did not sufficiently do away the probable cause established by the affidavits for the prosecution, and therefore the defendant was ordered to give bail in 4,000 dollars, and two sureties in 2,000 dollars each.

Millick & Burger vs. Peterson.

MILICK & BURGER vs. PETERSON.

The declarations of an agent for the defendant, by whose orders the plaintiff had made insurance for the benefit of the defendant, were not admitted to prove the liability of the defendant for the premium. The policy of insurance, without other proof of the payment of the premium, is not evidence of its payment.

THIS was an action on the case, to recover a premium of insurance paid by plaintiff for defendant, on a policy effected on the Phoenix, the property of defendant, in an insurance office at New-York. The order for insurance was given by W. Wiseman, without mentioning the defendant; and the policy stated W. Wiseman as the person insured. Evidence was given to prove that Wiseman acted as the agent of the defendant, in ordering the insurance. Wiseman sent to the plaintiff his note for the premium, as usual, payable in twelve months; but before the note became due, Wiseman failed. The plaintiff, understanding that the insurance was made for the defendant, procured from Wiseman the defendant's letter, ordering him to have it effected; and got him to add on the foot of it, the order he had given to the plaintiff.

A witness was examined, who stated sundry conversations he had had with Wiseman respecting this business; and was about stating that Wiseman told him the defendant would pay the debt.

The Court thought this improper evidence. Wiseman was the defendant's agent only to effect the policy. His declarations that defendant would pay, are not evidence in the case.

It was proved by a witness, that it is the constant custom to retain the policy until the premium is paid, or a note with a good endorser given, and then it is delivered out.

MILICK & BURGER vs. PETERSON.

Hallowell, for plaintiff, argued to the jury, that the printed acknowledgment in the policy that the premium was paid, is *prima facie* evidence of the fact. This, together with the circumstance of the plaintiff's being in possession of the policy, which he could not be unless he had paid the premium, is sufficient to establish the fact.

The Court expressed an opinion, that better evidence could be given of the payment of the premium. That inferior evidence ought not to be left to the jury, when it appeared that there existed better in the power of the plaintiff. If he has paid the note he gave for the premium, he ought to produce it, or prove it to have been paid by other evidence. But on recommendation of the Court, a juror was withdrawn.

NOTE.—The insurer may recover the premium, notwithstanding the formal receipt in the policy, which is not inserted as conclusive evidence, but to preclude the necessity of proving it in case of loss. 1 Marsh. on Insur. 240.

Carson's Lessee vs. Boudinot.

CARSON'S LESSEE vs. BOUDINOT.

Ejectment for the recovery of a building which had been purchased by the plaintiff at a sale made by the sheriff, under a lien, entered according to the Act of Assembly of Pennsylvania securing to mechanics and others the value of materials furnished for the erection of houses, &c.

A mechanic who has erected a building on the ground of another, under an agreement with the owner to convey the same on ground rent, becomes the equitable owner of the building, and within the provisions of the Act of Assembly.

A purchaser at a sheriff's sale, under a judgment for the lien, entered according to the law of Pennsylvania, of the equitable ownership, cannot maintain ejectment against the proprietor of the lot of ground on which the building stands.

THE defendant entered into a contract with one Bartlet, for building three houses on lots belonging to the defendant in Philadelphia; during the building of which the defendant was to advance a certain sum. One of the houses was to be the defendant's, and the other two Bartlet's, upon a certain ground rent; and after the buildings were completed, the defendant was to convey to Bartlet.

Bartlet purchased a quantity of the iron work used in the building of the houses, from the lessor of the plaintiff; which not having paid for, the plaintiff obtained a judgment against him for the amount, and sued out an execution, upon which these houses, or one of them, was levied on, and sold to the lessor of the plaintiff, and was regularly conveyed to him by the sheriff.

This ejectment was brought to recover possession of this property, under an Act of Assembly of Pennsylvania, in 1803; which declares, that every house thereafter built in the city of Philadelphia, or the liberties thereof, shall be subject to the

Carson's Lessee vs. Boudinot.

payment of the debts contracted by the *owner or owners* thereof, for or by reason of any work done, or materials found and provided, by any brick-maker, &c., [enumerating the different workmen,] or by any other person employed in furnishing materials for the erecting such house, before any other lien, which originated subsequent to the commencement of said house; but if such house should not sell for a sum sufficient to pay all the demands for work and materials, the same shall be averaged, and the creditors paid in proportion; and it provides that no such debt shall remain a lien longer than two years from the commencement of the building, unless an action for the recovery thereof be instituted, or a claim filed within six months after performing the work, or furnishing the materials, in the office of the prothonotary of the county where the houses lie.

Wallace, for the defendant, moved to nonsuit the plaintiff, upon the ground that Bartlet was not the *owner*, the legal estate being in defendant; and consequently the materials were not furnished to the owner.

By the Court. Bartlet was entitled to the equitable estate under the agreement with the defendant, and might be as much the owner as if he had been the legal owner. If not the equitable owner, he was authorized to make the building, and might bind the defendant, who was owner.

To this last observation Wallace replied, that if Bartlet was the agent only, then the suit of the plaintiff to establish his demand should have been brought against defendant, instead of Bartlet.

The Court, however, on the first point, refused to nonsuit the plaintiff.

Wallace then moved for a nonsuit upon another point, viz. that Bartlet having only an equitable estate, the plaintiff could buy no other kind of estate under the sheriff's sale; and on such a title he could not maintain ejectment in this Court.

Garrison's Lessee vs. Boudinot.

By the Court. Upon this ground the plaintiff must be called. Upon the lien alone it is admitted an ejectment will not lie. The plaintiff then must rely on the sheriff's deed. But that deed could convey no other or greater estate than Bartlet had, which was merely an equitable one; and such an estate is not sufficient to maintain an ejectment in this Court.

The plaintiff suffered a nonsuit.

Peterson vs. The United States.

PETERSON vs. THE UNITED STATES.

Information for a breach of the Act of Congress for registering and recording ships and vessels of the United States.

Upon a special verdict, the Court has only to decide the law upon the facts stated, where a difficulty is expressed by the jury upon the facts. But if the jury express a doubt as to a particular point of law, the Court can only decide the law upon that point.

The mere settlement of an account between parties, one of them being represented by an agent, does not make a contract between the parties, although it may be evidence of a contract.

If, in an account settled between parties, an interest in a vessel is debited to one of them, the charge might be evidence to satisfy a jury of the fact of a sale and transfer of the vessel; but it is not in itself a transfer; and the Court, if the fact of such account and debit are proved, cannot say there was a transfer of a vessel.

THIS was an information in the District Court, for a violation of the fourth section of the Act for registering and recording ships or vessels, &c.; passed in 1792; in which the oath stated in the section is set forth; and it is asserted that an alien, viz. Don Bass. Roderigues, a subject of Spain, was at the time the vessel was registered, interested in her.

The jury found a verdict to the following effect: that Bass. Roderigues, a subject of Spain, held an interest in the ship Phoenix, connected with Peterson, at the time of her purchase, and sailing from New-York, in February 1803. They find a settlement of money concerns, which took place between W. Weissman, the agent of Peterson, and J. S. Spinosa, agent by power of attorney, of Roderigues, on the 20th of January 1804; when the balance was paid by Weissman to Spinosa, (alias Spence.)

But the jury doubt respecting the powers of Spinosa, by act-

 Peterson vs. The United States.

tlement of an account, to vest the property or right of Roderigues in the Phoenix, in Peterson solely. If, in law, the contracts and powers of attorney enabled Spinoso legally to part with the right of Roderigues in the ship, then the jury find for the defendant; but if they did not so enable Spence, *by settlement of an account*, legally so to do, then they find for the United States the sum of 7000 dollars.

The two powers are dated on the 23d of June 1802. One of them grants full power to Spinoso, or Spence, to undertake any contract or negotiation on behalf of Roderigues; he, the said Roderigues, binding himself to make good the appointments at the times and manner stipulated. That whatever contracts may be entered into by the said Spence, he, Roderigues, in like manner will adopt, establish, and ratify; and he engages to fulfil them in the manner stipulated, granting him all necessary power; with an unrestrained and general liberty to act, exempt from the expenses.

The other power is more special, and is confined to two objects; first, the collecting all moneys due in the United States to Roderigues; second, to buy a vessel of 300 tons, and make Roderigues responsible for the purchase thereof, or of negroes.

On the 6th of July there was a contract entered into between Roderigues and Spence, in which the latter agrees to go to the United States, and to recover all debts there owing to Roderigues, "which are proved by the acknowledgment of bills which he delivers to me, with the respective powers for the recovery of the same, amounting to 11,275 dollars." When said recovery is had, Spence agrees to buy a ship of 300 tons, properly equipped; then to go to the nearest Spanish port, and have her made a Spanish vessel; then to the African coast, and to buy a cargo of negroes, to be purchased with the money received in the United States; then to go to Callao, and dispose of vessel and slaves. One-third of the proceeds to be allowed to Spence for his trouble. If the vessel cannot be bought for

Peterson vs. The United States.

want of money, so as that the expedition for negroes shall fail; then said Spence has full power to act in the manner best suited for his return to Lima.

⁴ The case was argued by Mr. Dallas for the United States. The jury find that in February 1803, an alien was interested in this vessel, together with the plaintiff; that a settlement of a money account took place between Peterson and Rodrigues; and they doubt only as to the power of Spence in this settlement to transfer the vessel.

The contract and power must be considered together, and we find the objects were, to collect debts, buy a vessel, and to carry on the slave trade; but there was no power to sell the vessel, which was in derogation of the whole scheme proposed. The general expressions of one of the powers must be confined by the contract to the slave business. The only mention of a sale of the vessel is at Callao.

But independent of the want of power, Spence could not legally transfer, because immediately on the purchase made for an alien, the vessel was forfeited, and the property devested. The transfer even to a citizen, for the purpose of obtaining a register, could only be by bill of sale reciting the old register and the whole transaction was tainted with fraud. He cited 2 Rob. Rep. 114, 115. 6 East, 144, 145. Idem, 427. 4 Idem, 180. 1 Pow. on Contra. 128. 106. 201. 3 T. Rep. 454. 1 Bos. & Pull. 297. 354. 6 T. Rep. 61. 4 Dall. 298. 308. 269. 3 Kaine's New-York Rep. 1. 4. 3 Bac. Ab. 295. 97, 98. 7 Idem, 7. 30.

Tod and Peters, junior, for plaintiff. The jury find that his powers and contracts enabled Spence legally to transfer, then they find for Peterson, which is of course finding that the transfer was made.

The contract does not appear to have been communicated to Peterson, and therefore is not to be regarded; for a secret power or instructions, will not affect third persons acting under

Peterson vs. The United States.

the open power. Pothier on Oblig. 54. a. 4. s. 79, to Mod. 10, 11.

Spence had a power to settle accounts. If Peterson was a trustee for Rodriguez for a part of this vessel, and Spence withdrew the funds from Peterson in the settlement on which the purchase had been made, this operation of course reverted the property in Peterson. 2 T. Rep. 666. Wills. Rep. 117. Harder. Cases, 115. 1 Wills. 55; were cited, to show that the Court can infer nothing in a special verdict, not found by jury; consequently no part of the charges in the information can be inferred to exist, but those stated in the verdict.

WASHINGTON, Justice, informed the counsel for the plaintiff in error, that he must confine himself to the question, whether any judgment could be rendered on the verdict; if he should think it worth while to say any thing after hearing the observations which would be made by the Court.

Upon a special verdict, the Court was only to decide the law upon the facts stated. The jury, in such a case, by their general conclusion, express their doubts arising upon all the facts which they state. If instead of making a general conclusion, the jury express a doubt only as to particular points of law, the Court has nothing to do but to decide the law upon those points; and the judgment will be rendered for that party in whose favour the jury find, in case the law be with him.

Now in this case, the jury declare that the point they doubt is, whether Spence, by *settlement of an account*, had a power to vest the property or right of Rodriguez in the vessel in Peterson; and though in propounding the point of law to be decided by the Court, they seem to place it upon the powers of Spence, under the letters of attorney and contract, to re-transfer; yet it is obvious, from the whole finding taken together, that the point they meant to submit, referred to the power to transfer by a *settlement of accounts*.

Now this is a question which it is impossible for the Court

Peterson vs. The United States.

to answer. The mere settlement of an account, does not in itself constitute an agreement, or amount to a contract; though it may be evidence of a contract. If the value of Rederigues's interest in this vessel was debited in that account to Peterson, this might have been evidence to authorize the jury to find the fact of a sale or transfer of the vessel; but it is not a transfer, and therefore the Court, who cannot decide except upon facts found, cannot say that there was a transfer in this case. If the jury had, from the evidence, found that fact, then the questions of law might arise which have been debated. This objection to the verdict appearing on the face of it, a *verdict de novo* ought to be awarded.

APRIL TERM, 1807.

Vanderwick vs. Sumner.

VANDERWICK vs. SUMNER.

In equity.—Where money belonging to A and C, arising out of a joint transaction between him and C, has, with the knowledge by B of the interest of A in the same, been placed by the agent of A and C to the credit of B and C, who are partners, and C is indebted to his partner B; B cannot apply the money of A to the credit of C, in satisfaction of his claim upon him.

The Court observed that where accounts were referred to a master, they would not settle principles previous to taking an account; but they must be brought before them on exceptions.

THIS ~~case~~ was brought for an account, and amongst other items there was one for the plaintiff's interest in the cargo of a vessel, the *Mary Ann*, owned and managed by Brown, and shipped on his and the plaintiff's account, before he became a partner with the defendant; but the proceeds of which came to the hands of Brown & Sumner, after their partnership, and with full notice to Sumner of the plaintiff's interest therein.

The case, as it appeared from the accounts rendered, from the correspondence, and from proof by depositions, was shortly this: Certain commercial transactions had taken place between the complainant, *William Smith Davidson*, and *Isaac Brown*, a resident of *St. Domingo*, amongst which was a shipment of *Sugar*, made by the latter on the joint account of himself and the complainant, in a vessel belonging to the complainant, to the island of *Mariegalante*, just previous to the capture of that island by the English. Before the vessel sailed with her return cargo the island was taken, and the vessel and cargo libelled and condemned. From this sentence, an appeal was entered, and restitution was awarded by the Court of Admiralty in England. Brown, not satisfied with simple restitution, laid his claim for

PENNSYLVANIA,

Vanderwick vs. Summerl.

damages before the Commissioners acting under the British treaty, who awarded a certain sum to be paid by the government on that account.

In 1794, the defendant and Brown entered into partnership, and there was strong evidence to induce a belief that the defendant was perfectly acquainted with the interest of the plaintiff in the cargo of the *Mary Ann*, and consequently that he was entitled to such a proportion of the money and damages, to be paid in England, as his proportion of the cargo: In 1802, and afterwards, the money on account of the *Mary Ann* was received, and at different times remitted by Kowan, the agent in England, or placed by him to the credit of Summerl & Brown; which sums were placed to the credit of Brown, on the books of Summerl & Brown. Brown afterwards died insolvent.

The single question was, whether in the accounts to be settled between these parties, any part of the proceeds of the cargo of the *Mary Ann*, ought to be debited to the defendant. It was contended by Kow for the defendant, they ought not: Brown was the only receiver of the money. He was largely indebted to the defendant, as appeared by the evidence; and if he took the plaintiff's money to pay his individual debts, the plaintiff cannot follow it into the hands of the defendant, but must look to the estate of Brown; or if that be insolvent, as is admitted, it is the complainant's misfortune.

For the plaintiff it was said, that Brown alone received the money, and that he paid a debt to the defendant, or used it for the joint concern, the money could not be specifically followed; nor could there exist any implied contract between plaintiff and defendant. But the reply came to, and was resolved by Summerl & Brown jointly, the defendant knowing that he was receiving the money of the plaintiff. This created a contract in Summerl & Brown to pay the plaintiff his proportion, from which the defendant is not discharged by the book operation.

APRIL TERM, 1897

Vanderwick vs. Summerl.

of placing the whole to the credit of Brown, in the books of Summerl & Brown.

The Court ordered an account to be settled by the Commissioners of the Court, with directions to credit the plaintiff with his proportion of all moneys received on account of the cargo of the Mary Ann for redemption, and from the government of England.

Vanderbilt v. G.

damages before the Commissary, who awarded a certificate on that account.

In 1794, the defendant and there was strong and was perfectly in the cargo of the ship, entitled to sue, paid in England, afterwards received, in England, Bro. bo. v.

MAHER v. SMITH. The plaintiff obtained a judgment in the proceedings on a judgment in the following circumstances. G. drew two bills of exchange on S., who accepted them for the accommodation. S. became bankrupt, and obtained his certificate. S. executed a certificate of S., arrested him in New Jersey, and made him the agent upon which the judgment was obtained, which was for the use of M. The Court refused to dissolve the injunction, as no money had been paid to S., but deemed the whole a contrivance to get rid of S.'s discharge under the bankrupt law. By a special action on the case, S. might recover from G. what he had actually paid to M.

THE case, as it appears from the bill and answer, is shortly as follows. The plaintiff drew two bills of exchange on Smith for 8000 dollars each, payable at four and six months; which Smith accepted for the accommodation of the plaintiff.

These bills were drawn in favour of Maher, who employed one of them to A. Harper.

Smith assigned to a trustee, a debt he had against the Bank of England and W. Hensley, to satisfy the judgments obtained against him on these bills, in 1801, and in 1804.

Maher delivered up the acceptance which he had for 8000 dollars, and gave a receipt in full of the judgment, which thereby became satisfied; and satisfaction was accordingly entered on the record thereof. Still further to secure the said Maher, Smith, in 1804, assigned to Nathaniel Smith, all debts due to him from the plaintiff, on account of money paid by Smith for the plaintiff, on his warranty, in consequence of his acceptance of his bills, and all any other accounts and also a

Greenleaf v. Maher & Smith.

against the government of France; subject, next, the claim of Graydon; Rogers & Pakeney, and contingent right of Smith in certain property conveyed to Mr. Troup in trust for paying a large sum due to different persons: after that trust was executed, all the property so assigned, was in trust, to pay first his debt to Maher, and then the one due to Harper. This deed recites the assignment of the claim against Pakeney to Hornby, which it declared to be yet subsisting.

A writ was brought in the Circuit Court of Pennsylvania, by Smith, against Greenleaf, to recover the amount of the acceptance to Maher, on which no bill was taken.

The defendants considered the suit as brought for the benefit of Smith, inasmuch as the money to be recovered therein, is with other claims assigned as collateral security for the debt due to Maher; and if that debt should be paid out of the other trust property, the money recovered from Greenleaf, would go solely to Smith. They admit, however, that so far as the money, when demanded, will go to Maher to satisfy his claim against Smith, he has an interest in the suit. Smith set out a proceeding against Rogers & Hornby for the same purpose.

Greenleaf, on the 15th of January in New Jersey, was arrested at the request of Smith, and held to bail for \$4,000 dollars, the suit being to recover the amount of the two acceptances made by Greenleaf to Maher in Pennsylvania and still depending. The plaintiff was unable to give bail, whereupon a writ of habeas corpus was granted between Maher, Greenleaf and attorney at law for plaintiff, and the attorney for the defendant, Smith, whereby the latter agreed to accept the note of Greenleaf for 2000 dollars, endorsed by Maher, to be applied in all events towards the discharge of the acceptance for 8000 dollars, for which the suit in Pennsylvania was brought, and on receiving this note, Greenleaf was discharged from the custody of the sheriff, and the suit in New Jersey dismissed.

On the 15th of January 1867, a writ of habeas corpus

WEEKLY ANGLO.

Greenleaf vs. Maher & Smith.

personal agent of the complainant, and his certificate was signed in the month of April of the same year.

The plaintiff having obtained an assignment to present the holder of the note for \$1000 dollars, a motion was now made to discharge it.

WASHINGTON, Justice. If it appeared that the bill had been fairly sold by Smith, by means of property sold to the holder, or conveyed in trust for payment to his satisfaction, and the bill was given up, we should think that it was nothing to Greenleaf how it was paid. But it appears that the whole business has been conducted with a view to save Smith, and it does not appear to the Court, notwithstanding the answers, that the trust property, exclusive of the claim against Greenleaf, is worth more than enough to pay the assignee. If so, then the case stands as if Maher's claim against Greenleaf was defeated by the certificate, had merely appointed Smith, who was ultimately liable to him, to use Greenleaf in his name, but for the use of Maher, and to enable him to do so, had acknowledged satisfaction received upon the bill. Smith in fact gave nothing, that relieved the debt, and gave up the money to Maher. But still the case stands. He gave only a receipt, in a book, and on the certificate which was paid. It would, therefore, be necessary to discharge the assignee, until we can ascertain the value of the property which was assigned to the plaintiff.

As the assignee is to discharge the assignee, the assignee is to discharge the assignee.

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Bank of North America vs. Meredith.

BANK OF NORTH AMERICA vs. MEREDITH.

M. and R. had become, by separate engagements, liable to make up any deficiency of the proceeds of property assigned to the plaintiffs to pay the debts of another, ~~of equal portions of which they were also liable as~~ ~~creditors.~~ After the death of the deceased, in account was rendered, in which the proceeds of the sale were credited to both M. and R. Having become insolvent, the Court refused to permit the plaintiffs to apply the proceeds of the property to discharge the whole of R.'s engagement, and to claim the whole deficiency from M.; the plaintiffs having applied the proceeds, in the first instance, to the discharge of both debts.

THIS was a case stated for the opinion of the Court. The Schuylkill and Susquehannah Canal Company drew a bill for 7000 dollars on their treasurer in favour of Ruston, and another in favour of the defendant for 10,000 dollars, which they endorsed, and got discounted at the Bank of North America. These drafts were protested, and the Canal Company conveyed to the Bank considerable property, with a declaration of trust, that if the above debt of 17,000 dollars was not paid in a certain time, the property should be sold to discharge it. Ruston and the defendant entered into separate engagements, to continue responsible for what might not be raised by this property.

The Bank sold the property, and rendered two accounts at different times, in which the Canal Company is charged with the 17,000 dollars, and interest, and credited with the sale of the above property as the money was received. Ruston having become insolvent before those accounts were rendered, the question reserved is, whether the proceeds of the property sold shall be applied first, to discharge Ruston's bill, and the residue to be applied to the defendant's; or whether they shall be

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applied to both, in proportion to their amount. Lewis and
Meredith, for the plaintiffs, contended that the Bank had a right
to make the application; which was denied by Read, by default
of the defendant, and he cited 1 Vern. 34.

WASHINGTON, Justice. Both law and equity are against
the plaintiffs. Upon the strictest principles of law, the plain-
tiffs have lost their election. The deed from the Canal Com-
pany made a specific application of these funds to both debts;
and the Bank, by the two plaintiffs, understood it in this way,
and applied the proceeds to the two bills. To attempt to vary
this application, after the failure of Ruston, cannot now be per-
mitted. These payments, therefore, must be applied to both,
in proportion to their amounts.

Hurst vs. Rodney.

HURST vs. RODNEY.

Quere, Whether under the Act of the Assembly of Pennsylvania of 1705, relative to the sale of lands taken in execution, *personal notice* of the time and place of the sale should not be given by the sheriff.

THIS was a *reple* to show cause why an execution issued against the defendant by the plaintiff, and levied on the defendant's land, which had been sold, should not be set aside. The ground of the motion was, that the defendant had not received *personal notice* of the time and place of sale; and it was founded on an Act of the Assembly of Pennsylvania, passed in 1705, c. 153, s. 4; which directs, that before any sale of land taken in execution shall be made, the officer shall cause so many writings to be made as the debtor shall reasonably require, or so many without such request, as may be sufficient to give notice of such sales, and of the day and hour when, and place where the same shall be, and what lands are to be sold, which notice *shall be given to the defendant*; and the said papers shall be fixed up by the officer in the most public places of the county, ten days before the sale.

The plaintiff showed cause, that the time and place of sale had been duly advertised in the public papers; and it was agreed, by the bar, that this had always been the practice, and that *personal notice* had been seldom given, and it was not deemed necessary.

The Court observed that the words of the law were very strong indeed, and seemed to require *personal notice*; but that if evidence of notice could be brought home to the defendant in any way, as that he had seen the paper in which it was advertised, or that he took that paper, it might be sufficient; or even an acquiescence under the sale, if known to the

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defendant, might do. But as the finished practice was stated to be in conformity with the course pursued in this case, it might be an important consideration, whether it ought not to be disturbed.*

Before the Court gave any final opinion, the parties consented to setting aside the sale, both being dissatisfied with it. The purchaser of the property having also agreed to it.

Coster vs. The Phoenix Insurance Company.

COSTER vs. THE PHOENIX INSURANCE COMPANY.

The order for insurance on goods on board the *Draper*, directed it to be made free of average under ten per cent., and the ship, on her arrival in the Texel, was subjected to charges and damages under ten per cent. in the nature of general average.

The original meaning of average, was a general contribution on ship, cargo, and freight, towards a loss sustained for the benefit of all. At this time, such average is always called *general*. It is usual to add to the terms, *general*, *partial*, or *particular*, to designate the average intended.

Where the written clause in a policy is inconsistent with the printed parts of it, the former will be deemed and taken as the contract of the parties.

THIS was a case agreed, which stated, that in 1803, an order for insurance on goods on board the ship *Draper*, at and from New-York to Amsterdam, was given by the plaintiff's agent to the defendants; in which it was stated the sum were to be free of average under ten per cent.

On the 26th of December 1803, a policy was subscribed by the defendants on goods on board the same ship, at and from New-York to Amsterdam at five per cent.; which insurance was declared to be made on one hundred and twenty-five bales of cotton, and thirty-six boxes of sugar, valued at 12,150 dollars, and warranted free from average under ten per cent., and with other warranties not in question.

That the following [printed] clause was also contained in the policy, viz. "Memoranda. It is agreed that salt, wheat, Indian corn, yams, or any other kind of grain, malt, dried fish, shewed in bulk, leaf tobacco or otherwise, fruit of all kinds, and any other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; all other goods free from average under five per cent., unless general."

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The vessel sailed from New-York, and arrived in the Texel, where she was subjected to certain extraordinary expenses and damages, of the nature of *general average*.

The question submitted to the Court was whether the defendants are liable and chargeable with the said average loss, being general, but under ten per cent. If the Court should be of opinion that the defendants are liable for the said general average, judgment to be rendered for the plaintiff; the amount to be agreed upon by the parties. If the opinion should be that they are not so liable, judgment to be rendered for the defendants.

Ingersoll, for the plaintiff, argued that the *written* clause, taken in connexion with the printed, clearly shows that the intention was merely to exempt the underwriter from particular average under ten per cent., instead of five per cent., as in the present form of the policy; and that the words, "unless general," in the printed form, should be applied to the written clause, which would make the whole plain.

Rawle, for the defendant, insisted that the *written* words in the policy always control the printed. *Average*, in its general signification, means a contribution to a general loss; and unless it be qualified, it is always to be taken in this sense. But, taking both together, the meaning is, that the defendant should not be liable either for general or partial loss, under ten per cent.

Mr. Ingersoll replied, that the written part never controls the printed, unless where they are inconsistent. *Average* is the general term, and comprehends as well partial as general average. He cited *Park*, 99. 121.

WASHINGTON, Justice. The word *average* originally meant a contribution, by the owner of the ship, cargo, and freight, towards a loss sustained for the general benefit of all. But, when understood in this sense, it is at this day always called *general*, to distinguish it from *particular average*, which means nothing more than a partial loss. So that from the above

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that the term *average* was used to express a partial loss, the word *average* has, in the common understanding of commercial men, so far varied its original meaning when applied to original insurances, as to import as well a general contribution, as a particular loss; and is intended to be used in either of those ways: the adjuncts *general*, *partial*, or *particular*, are always affixed.

An attention to the true meaning of this phrase, will assist us in understanding the point in controversy. The printed clause liberates the underwriters from particular average to any amount, on articles of a perishable nature, and on other articles where the loss amounts to less than five per cent. The written clause discharges the underwriter from *all* responsibility for average losses, whether general or particular, under ten per cent. These clauses are inconsistent with each other, and one or the other must give way. If the written clause varies from the printed, it is evidence of a special contract made in that particular case, different from the usual contract of insurances; and it must necessarily be considered as the real agreement of the parties. If the written and the printed clauses can be reconciled by any fair construction, it ought to be done; if they cannot, the former must prevail. Whether, in this case, the not qualifying the general expressions, proceeded from mistake or was designed, is quite uncertain. The insured may possibly have expected that the usual words, "unless general," would be added, and the underwriter may have taken a smaller premium in consideration of being exempted from general average losses, under ten per cent. There is no certain ground to go upon, but the construction fairly deducible from the expressions which the parties have used. The opinion of the Court therefore is, that the defendants are not liable for the average loss, and this judgment should be rendered for them.

James G. Thompson

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S. Clapp, master,
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her voyage, was captured and taken possession of as prize, by the French privateer schooner *Napoleon*, and carried into Lemon, an out-port of Samarra. The captors there committed great pillage of the cargo. The *Rolla* remained at Lemon four or five days, and was then carried to Samarra, under the charge of a prize-master, where further pillage was committed. The captors looted the vessel and cargo, in the inferior tribunal at the city of St. Domingo; and both were acquitted on the 7th of July. This decision was appealed from, by the captors, to the superior tribunal, at the same place; when the said vessel and cargo were again acquitted, and restitution awarded. On the 9th of July, restitution of the *Rolla* was ordered to be made to the captain, with what remained of her cargo.

On the 19th of July 1806, restitution was actually made; but, if the Court should think there is a collision in the evidence, as to the hour or time of actually delivering possession, and the time shall appear to them material, the Court are requested to fix the hour or the time, according to their opinion of the credit and weight of the evidence. The captain had a survey made on the same day, to ascertain the loss and damage from pillage, &c.; and on the 30th of July, he proceeded on his originally-intended voyage to St. Jago de Cuba; where he arrived on the 9th of August, and where the remainder of the cargo was sold, and a part of the proceeds invested in a return cargo, which was sent by the *Rolla*, under the command of the mate, to New-York, and the rest of the proceeds were invested in bark, and brought home in the *Jane* by the captain.

The return cargo arrived at New-York, on the 15th of October 1806; and on the following day, the plaintiff wrote to his agent in Philadelphia, informing him thereof; and directing him to give the information to the insurers, which was accordingly done; but the insurers refused to have any thing to do with the property, or to give any directions as to the disposal of it. The plaintiff then sold the said property, for the

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account of the underwriters, but without their consent; except some bark, which yet remains unsold.

Intelligence of the capture was received at New-York by the plaintiff, on the 17th of July 1806. He wrote on the 18th to his agent, directing him, to abandon the freight, vessel, and cargo to the insurers; which letter was received at Philadelphia, by the agent, on the morning of the 19th, and an abandonment was made to the insurers on the morning of the 19th, of which abandonment the said agent informed the plaintiff by a letter, which was forwarded to New-York, by the mail of the said 19th of July, which was closed at Philadelphia at twelve o'clock of the same day.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover for a total or a partial loss?

Ingersoll and Hopkinson, for plaintiff, contended, first, that if a loss happen by capture, of which the plaintiff is informed, and he offers to abandon, not knowing that the property has been acquitted and restored, though the fact be so, before the offer made; the abandonment is good to authorize the insured to go for a total loss. The loss happened here by capture and detention. Second; that, upon the evidence, the restitution was not complete till one o'clock in the afternoon, whereas the abandonment must have been before twelve o'clock. As to the doctrine that there are no fractions of a day, it does not apply where priority of time, as to two facts, become important. 1 Ld. Ray. 281. 2 Idem, 1568. 3 Burr. 1433.

Rawle and Dallas, for defendants, denied both propositions. They cited 1 Esp. Rep. 237, to show, that even after a capture, condemnation, and sale, and the vessel purchased by the captain for his owners, that the insured could not abandon; the captain being the agent of the owners in the purchase. They relied upon the expressions of the Supreme Court, in *Rhineclander vs. The Insurance Company of Pennsylvania*; and of the Supreme Court of Pennsylvania, in *Dugill and Galley*; and of Lord Mansfield, in *Hamblin vs. Mendez*; to prove that the

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fact of the loss continuing to the time of the abandonment, and not the information, fixes the right of the insured to abandon. Also the case of *Hallet vs. Payton*, 1 Caine's New-York. Rep. 38, in which the case has been directly decided. They also cited *Park*, 75. 161.

WASHINGTON, Justice. The question is, whether if a right to abandon once exist, the subsequent release or safety of the property before the abandonment, but the fact unknown to the insured, will defeat that right, has never been directly decided, that we know of, but in the case of *Hallet and Payton*.

The reasoning of the case would seem to show, that the state of the loss at the time of the abandonment, ought to decide the right of the insured to make the loss a total one, and thus to throw the property upon the underwriters; and to demand from them the sum insured. The foundation of the right is the loss of the property, really or technically; and the transfer of what may be saved to the underwriter, is predicated upon the reality of the loss. But if the property be in safety, how can the underwriter, under the terms of his contract, be called upon for an indemnity; which was only promised in case of loss, and when no injury, or such as is merely partial, has been sustained? The information received by the insured may have been correct when it was given, but it cannot make the fact otherwise than it really is, at the time when the claim is made for a total loss.

Although there is no case, but the one before mentioned, precisely in point, yet there are some which seem to throw considerable light upon the subject; and we think, enough may be gathered from what was said by Lord Mansfield, in *Hamilton vs. Mendez*, to show his opinion respecting it. In that case, the vessel, which had been captured and recaptured, was brought into Portsmouth, before the offer to abandon. It is not stated; that at the time of the offer the arrival of the vessel was known to the insured, though the fact is strongly to

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be inferred. But it is clear, that if such was the fact it does not enter into the reasoning of the Judge, who, when he lays down the principles of the law, uses expressions and illustrations, which seem strongly to exclude that circumstance from the consideration which he took of the subject. His Lordship observes, that this action which is brought for an indemnity, must be founded on the nature of the damage, as it really is at the time of the action brought, or, at most, at the time of the offer to abandon. He considers it absurd to recover as for a total loss, when the *fact event* proves that there was no loss at all, or only a partial one. He seems to fix the time of bringing the action, as that at which the rights of the parties are to be decided; and then lays it down, that if the cause of action does not subsist at the time, its having existed at any previous time will not avail. In no part of this opinion does he appear to consider the right of the insured to go for a total loss, to depend upon the circumstance of information he had received of the situation of the property at the time of the offer to abandon, or at that of the action brought; and the cases which he cites as analogous to, and the authority of, the doctrine he is endeavouring to establish, afford strong ground for believing that he altogether relied upon the loss continuing to the time of abandonment and bringing the action; (and so he also expresses himself in another part of the same case) and not upon the information, to the insured of the safety of the property. For certainly it cannot be contended, that in answer to a plea of the tenant, in an action of waste, that he had repaired before the action brought; or to that of the principal to an action of the surety for an indemnity, that he had paid the debt; the plaintiff could reply, that at the time of bringing the action, he had not notice of the fact set out in the plea. And I think it is impossible to produce a case upon any other subject, where the rights of the parties could be made to depend upon any thing, but the real facts at the time when these rights accrued. Why should there exist an exception in these

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of insurance? That Park has deduced the same conclusion which this Court does from the expressions of Lord Mansfield, in this and other cases, is very obvious. He says; that "the loss must continue total at the time when the offer to abandon is made, or the action brought." Park, 145. The case of *Hallett vs. Payton*, in the highest Court of Judicature in the state of New-York, which appears to have been very fully argued and considered by the Court, is in point. "The expressions used by the Supreme Court of the United States, and the Supreme Court of this state, in the cases cited, are very strong, though like those of Lord Mansfield, in *Hamilton vs. Mendez*, they are *obiter dicta*. Upon the whole, then, relying upon these authorities, and the reasons which support them; and considering that they stand unopposed by any case whatever; we feel ourselves warranted in deciding this point in favour of the defendants.

The next question is, whether at the time when the offer to abandon was made, the vessel was, in point of fact, in possession of the insured? I say, *in his possession*, because these are the terms which the counsel, in argument, appeared to consider as proper. But we wish it to be considered, that this Court does not mean to decide that actual possession was not necessary after the decree and warrant of restitution delivered to the officer. It may, perhaps, become a question, whether if the property be in safety, by the acquittal and warrant to execute it, this circumstance may not be sufficient to defeat the right of abandonment. In the cases of capture and recapture, the possession of the property remains with the recaptors till salvage is paid; and in the case of *Hamilton vs. Mendez*, the possession of the recaptors continued after the offer to abandon.

As to the fact, we think it very immaterial, whether the possession was delivered before or after the examination made of the state of the cargo, for it is obvious to any person who looks at the *proces verbal*, that it must have taken more than double the time to write this warrant, than was consumed in

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obtaining a knowledge of the facts which it records; consequently, if it began at nine in the morning, and the *parces verba* was concluded at one in the afternoon, the facts of which it is a history, must have taken place and been completed long before meridian.

But we do not mean to decide so important a point, upon evidence which may be founded in conjecture. For we hesitate not to declare, that if for want of clear proof, the act of abandonment and restitution must be considered as contemporaneous, the decision ought to be in favor of the defendants, for two reasons—first; that the inclination of Judges is not to extend the right of abandonment, for the purpose of converting a partial into a total loss, beyond the point to which former decisions have gone, because such a right is not warranted by the contract of the parties: and secondly, because the insured ought not only to prove the loss, but the continuance of it to the time of abandonment; and if the evidence is not sufficient for these purposes, he must fail. Upon the whole, we are of opinion that the plaintiff is only entitled to recover for a partial loss.

Dederer vs. The Delaware Insurance Company.

DEDERER vs. THE DELAWARE INSURANCE COMPANY.

Insurance.—The vessel insured was captured by the British, on the alleged ground that a war had been declared, or soon would be, between England and the United States. The crew was taken out by the captors, and the captain, mate, and a boy, left on board, the vessel being ordered to Halifax. The captain, apprehending the loss of all he had on board, and that he would be imprisoned, made an attempt to rescue the vessel, with the assistance of the mate and boy, which failed; and the *Romulus* was libelled and condemned at Halifax as lawful prize. A regular abandonment was made, and the loss was stated to have been by capture and barratry.

Where a regular abandonment is made, the *property* vests in the insurer by relation to the time of capture, but the captain continues the agent of the insured, until abandonment. His acts, subsequent to capture, may operate to the advantage, as well as to the disadvantage of the insurer; and the insured is protected in the clause in the policy, which binds the master to act after capture, only when it appears that he acted for the best for all concerned. The unlawful acts of the master are never to be sanctioned. The attempt to rescue the *Romulus* was unlawful, and furnished good ground of condemnation.

The nature of barratry, and the principles of law relating to it. It is not essential to constitute barratry, that it should be to the interest of the master.

If the act of the master were intended to benefit the owner, although mistaken, it cannot be barratry, because it was not fraudulent, or criminal.

Acts of the master may be illegal, and yet not being criminal or fraudulent, they will not be barratrous.

If a sufficient cause for abandonment is stated by the assured to the underwriters, when he offers to abandon, he need not communicate other or additional causes, although they were known to him, if the underwriters refuse to accept the abandonment.

Depositions stated in the record of the proceedings of the Court at Halifax, were allowed to be read to show the ground of condemnation.

Quere. Whether the register of a vessel is *prima facie* evidence of citizenship, although it may be such evidence of property?

PENNSYLVANIA,

Dedover vs. The Delaware Insurance Company.

THIS action was brought on two policies of insurance, dated March and May 1806, on the ship *Romulus*, and on her freight, both valued: the former at and from New-York to Havana, and back again to New-York. (a) On her return she was captured by a British privateer, the captain of which assigned, as the cause of the capture, that war was either declared, or would soon take place, between Great Britain and the United States. All the hands were taken out of the *Romulus*, but the captain, the mate, and a boy; who, under a prize-master and hands, were sent to Halifax.

On the passage to Halifax, the captain of the *Romulus*, whose all was on board, as he stated, and apprehending its loss and his imprisonment, and the injury which a loss of the property would produce to his owners; concerted, with the mate and the boy, a plan to retake the vessel. The attempt was made, and after a warm contest was given up. The vessel and cargo were carried in, libelled as enemy's property, and condemned as good and lawful prize. The plaintiff, as soon as he heard of the capture, made a regular abandonment, which was refused by the underwriters.

The defendants offered to read depositions from the record of the trial at Halifax, to prove that the attempt to rescue the vessel was the ground on which the vessel was condemned. This was objected to, but admitted by the Court, to show what was the ground of condemnation.

In the opening of the cause, it was made a question, whether the register of the vessel was *prima facie* evidence of the citizenship of the plaintiff, to prove the warranty of American property, but not of citizenship. The cases cited were, 2 Dall. 491. 4 Idem, 342. *Contra*, 1 Dall. 141.

Sergeant and Ingersoll argued, that the plaintiff was entitled to recover on one of two grounds—capture, or barratry. As to

(a) The vessel warranted neutral, to be proved in this country. No warranty as to the freight.

Dederer vs. The Delaware Insurance Company.

the first, the right of recovery is certain, unless the attempt to rescue was a forfeiture of neutrality. The libel and condemnation show that the Court proceeded on the ground of enemy's property only. The attempt to rescue was produced by the misrepresentation of the captors, and therefore could not be made the ground of condemnation. The attempt to rescue was a consequence of the capture, which constituted a loss; and if the defendant was answerable for the capture, he is answerable for all the consequences of it. After the capture, the captain is equally the agent of the insurer and the insured, and the abandonment makes him, by relation, the sole agent of the former. Capture is, by abandonment, made a total loss; as much so as if the loss had been really total: and after a total loss, the captain ceases to be the agent of the owner. 1 T. Rep. 613.

But, secondly; if the captain, after the capture, continued the agent of the insured, his attempt to rescue was an act of barratry. It was a criminal act, contrary to his duty, contrary to the law of nations; done, in part at least, for his own advantage, and therefore comes fully within the definition of barratry. 6 T. Rep. 379. Park, 91. Comp. 142. Park, 90. 3 T. Rep. 277. Park, 94. 364.

Condy and Rawle for defendants. First; the attempt to rescue must be considered as the ground of condemnation, because it was a sufficient one, and no other appears to have existed. That to resist a search, or to attempt a rescue, is ground of condemnation, is proved by Vattel, and a number of other books which might be cited. The captain, after the capture, continued the agent of the insured. Park, 152. 4 Dall. 296. It is no proof, that the attempt to rescue was not the ground of condemnation; that the libel states the vessel as enemy's property; and that she is condemned generally as good prize. These are the constant forms; because, if there be a breach of neutrality, the property is always considered as enemy's property.

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Second; to constitute barratry it must appear that the captain acted fraudulently or criminally, with a view to his own benefit; and in all the cases, there were facts which proved that the motive was fraudulent or criminal. What was said in the case of *Moss vs. Bryson*, 6 T. Rep. 379, is very much qualified and explained by the declarations of the same Judges, in 7 T. Rep. 505. Cases cited as to barratry, Park, 91. 2 Ball. 137.

In this case it appears, also, that the captain acted under a misrepresentation. He supposed there was war between Great Britain and the United States, and that the act he attempted was lawful, and would redound to the advantage of his owners and himself. There could of course be neither fraud nor crime in the attempt.

Mr. Rawle made a ~~new~~ point for the defendant: that the insured, before he abandoned, had received a letter from his captain, mentioning the capture, and the unsuccessful attempt he had made to rescue the vessel, and stating that they were threatened to be libelled and condemned for that cause. This being known to the insured, it was his duty to have stated this to the underwriter as one of the grounds of abandonment. 1 Johnson's New-York Rep. 181.

As to this point, the Court observed, that if a legal ground of abandonment be assigned, it is sufficient, where the abandonment is refused. Had it been accepted, the underwriter would have been fully apprized of the attempt to rescue, as the letter of abandonment mentions that the insured is ready to furnish the proofs.

WASHINGTON, Justice, delivered the charge. The first question is, whether the plaintiff is entitled to recover upon the count which states the loss to have proceeded from capture? The defendant admits the fact, but answers that the plaintiff has forfeited his warranty of neutrality, by the misconduct of his captain; who, by an attempt to rescue the vessel, afforded a lawful ground for her condemnation. To this de-

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force the plaintiff replies, that the alleged misconduct of the captain took place after he was captured, and at a time when he was as much a servant or agent of the insurers, as of the insured; consequently, his acts could not prejudice the latter as between these parties. It is even argued by the plaintiff's counsel, that the offer to abandon changed the condition of the parties, from the time of the capture, by relation; so that by that event, the captain became from that time the agent of the insurers.

It is true, that where a regular abandonment is made, the property vests in the insurer, by relation to the time of capture; but the captain continues to be the agent of the insured, until the abandonment is made. His acts, subsequent to the capture, may operate as well to the advantage as to the disadvantage of the insured; it is his duty to do every thing in his power for the preservation of the property committed to his care; and the clause in the policy, which permitted him to act for the best, to this end, without prejudice to the insurance, binds the underwriter to submit to the consequences of those acts, if performed for the benefit of all concerned. But the introduction of this clause proves, that after a misfortune has happened, the captain continues to be the agent of the insured, who might by his conduct prejudice the claim of his principal for indemnity, if his acts for the common benefit of all concerned, were not sanctioned by the underwriters. This clause, however, grants only a special authority, and protects the insured only, when from the facts it appears he acted for the best for all concerned. But, can it be said that he acts within this authority, when he does that which the law of nations, and his duty to his owners, forbid? Those who employed him are answerable to third persons for such conduct because they trusted him; not because such a power was impliedly given to him. But the insurers did not employ him, though they granted him a special authority to act in a particular event, and in a particular way; and it never can be said, that from this au-

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authority a power to do an unlawful act is implied. If the act be not unlawful, the question always is, did he act for the best for all concerned? This is an inquiry proper for the consideration of the jury, upon the evidence submitted to them. But if the act be unlawful, then it is unauthorized by the underwriter.

That the attempt to rescue the vessel was unlawful, and afforded a ground of condemnation, is proved by the opinions of the best informed jurists, and has received the sanction of the Common Law Courts in a variety of instances. The doctrine was indeed admitted by the plaintiff's counsel, though said not to apply in this case; as the captain acted under misinformation given him by the captors. This excuse, however, will not do, as between the insurer and the insured; because the latter, before he can recover, must prove that he has strictly complied with the terms of his warranty. He cannot justify a breach of it, by alleging misconduct in third persons. Admitting the law to be so, the plaintiff then insists that the act which amounted to a breach of neutrality, proceeded from the barratry of the master; against which the defendants have undertaken to protect him.

It is certainly strange, after the repeated instances in which the Courts have been required to define the term barratry, a question should remain at this day as to the true import of it; and yet questions of difficulty frequently occur upon this clause in policies, when particular cases are to be decided by the former definitions of the term. The present case is one which admits of doubt, and has given rise to many ingenious arguments at the bar. Park defines barratry, "any act of the master of a criminal or fraudulent nature, or which is grossly negligent, tending to his own benefit, to the prejudice of the owners, without their consent." The act must be fraudulent, and to the prejudice of the owners. If fraudulent, it is a criminal violation of the duty which the master owes to his employers. It is not essential to constitute the act of barratry, that it should

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be to the interest of the master, but if it be so, that fact is evidence of fraud: so is gross negligence. If the question turn merely on the fraud, it will always be necessary to look at the motives and intention which influenced the act. If the motive were to benefit the owner, it is an honest one, though it may be a mistaken one, and therefore the act cannot be called barratrous. The case of a wilful deviation for the benefit of the owner, is an example which attests the truth of the principle; but if made for the benefit of the master, it would be an act of barratry.

The case of *Moss vs. Bryrom*, as stated in Park, and the principle which he deduces from it, seem opposed to the above doctrine. But by referring to the case itself, in 6 Term Rep., and to the explanations which the Judges in *Phyn vs. The Royal Exchange Insurance Company*, 7 T. Rep. 505, have given of their meaning when deciding that case; it will be found not to oppose, but to support the opinion we have delivered. The Judges declare, that what was said in *Moss vs. Bryrom* was in reference to the circumstances of the cause, which consisted of many acts of the captain of a criminal nature; and Ashurst adds that there is no case of barratry, merely because the act was against the interest of the owners; unless done with a fraudulent or criminal intent. But no fraudulent intention may appear, and yet if the act be of a criminal nature it will be barratrous. Marshall, it is true, says that no fault amounts to barratry, unless it proceed from an intention to defraud the owner; but he is not warranted in his position, by the case referred to, in which fraud was negatived by the jury. All the cases, when well examined, will show that if the act be fraudulent or criminal, it is barratry. But it does not follow, that every illegal act is a criminal one. For example; suppose the captain ignorantly commit a breach of blockade, or violate some foreign ordinance with which he is unacquainted: these acts would be illegal, but not criminal. The illegality of the act, though no improper or fraudulent motive appear, may be

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Prima facie evidence of fraud or of crime; but this presumption may be repelled by evidence. If, in reality, there was no fraudulent or criminal intention; no particular view to the personal benefit of the master, but an honest though mistaken motive to benefit his owners; the illegality of the act will not make it barratrous. Apply these principles to the present case. The captain had received information from the captor, that there was or would be war between Great Britain and the United States; and this was assigned as the cause for the seizure. He declares, that under the impression of this fact, and from a fear of loss of personal liberty, as well as of his own property and that of his owners, he attempted the rescue. But whether he was really induced to this act by the belief that he was captured by an enemy, you must determine upon all the evidence in the cause. If he was, then the attempt to rescue was not a criminal act. Nevertheless, if you should think that he acted for his own benefit, it was fraudulent, and would equally amount to barratry.

Verdict for plaintiff.

Hurst vs. Hurst.

HURST vs. HURST.

Construction of the Acts of the Assembly of Pennsylvania, passed in 1772, and April 4, 1798, relative to judgments, and to their lien on real estate.

The true construction of those laws, taken together, is, judgments shall be enrolled when they are signed, and they shall not, by relation, affect *bona fide* purchasers or mortgagees; and as to such persons, the lien of the judgment creditor shall cease, unless revived in five years by *scire facias*.

THIS was a rule, obtained by the executors of Brownjohn, and other creditors of Charles Hurst, upon the marshal, to bring into Court the money levied upon an execution of Timothy Hurst against Charles Hurst, to be disposed of among the applicants according to the priority of their judgments.

The judgment of Brownjohn was obtained in the state Court of Pennsylvania, in 1787, upon which an execution issued in the same year, and sundry subsequent executions of *venditioni exponas* issued, down to July 1799, on which part of the debt was levied. The execution of Timothy Hurst issued upon a judgment, recently obtained in this Court.

The claim of Brownjohn's executors to the money brought into Court was opposed by Wilson, who obtained a judgment in this Court against Charles Hurst, in April 1791. The ground upon which a preference was claimed for this judgment, which was subsequent to that of Brownjohn's, was, that the latter had lost his lien on the lands of Hurst, by his having omitted to sue out a *scire facias*, in pursuance of the Act of Assembly of Pennsylvania, passed the 4th of April 1798; declaring that no subsequent judgment now on record, shall continue a lien beyond five years from that time, or the time it is

PENNSYLVANIA,

Hurst vs. Hurst.

rendered, unless within that period a *scire facias* be sued out, and prosecuted in the manner prescribed by the law.

Hallowell and Hare, for Brownjohn. The Act of Assembly intended to protect purchasers only, and not creditors; and though the lien would not prevail against the former, *if bona fide*, yet it cannot be impeached by the latter. The mischief of the law, as it previously stood, was, that purchasers had no means of finding out what judgment liens were outstanding, since they did not lose their force from their antiquity; and therefore the mode prescribed by the law in question, to give them publicity, was well intended to remedy the evil. That this was the intention of the Legislature, appears from the preamble, which speaks only of purchasers. But even a purchaser, with notice, would not be permitted to impeach our lien. The preamble is a key to the intention of the Legislature. Cases cited, as to the use and force of a preamble, *Flow. Rep.* 332. 369. 1 *Inst.* 79. 6 *Bac.* 380, 381. 384. 586, 587. 1 *Atk.* 174. 182. 1 *Vex.* 364, 365, 366. 1 *Esp. Ca. Ab.* 19. 2 *Idem*, 684. The subsequent clauses of the law show the true intention to be expressed by the preamble; for the *scire facias* is to be served on the alienee, terretenant, and debtor, but not on creditors. A purchaser, with notice, will be bound by a judgment, though not docketed according to the statute, 4 and 5 *W. and M. c.* 20. 2 *Eq. Ca. Ab.* 684. No statute shall exclude all equity. 2 *Roll. Rep.* 301. *Sir W. Jones*, 39. 423. 2 *Vern.* 234. 750.

The same principle applied to purchasers under the Registry Act of Anne, 1 *Vex.* 66.

It was admitted, that no case had yet been decided in the state Courts upon this Act of Assembly; but apposite cases, decided upon other Acts, were relied upon. 1 *Dall. Rep.* 430. *Lavinch vs. Wells*, 4 *Dall.* 153. Subsequent purchasers, with notice, are bound by a prior unrecorded mortgage, notwithstanding the Act of 1715. 1 *Dall.* 450. The legal relation of a judgment will overreach a domestic attachment, which is even a

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stronger lien than a judgment. A judgment will relate back as to creditors, but not as to purchasers. 3 P. W. 398. Upon the doctrine of relation, to overreach the claims of creditors, were cited, 1 Sell. Prac. 536. 2 Vern. 218. 2 Show, 485. 6 Mod. 225.

A general creditor is not so much favoured as a person who has obtained a specific lien, on the faith of which he advanced his money. 4 East. 545. 1 P. W. 278. 2 Vez. 262, 263.

No *scire facias* was necessary in this case, an execution having issued, and having been kept alive. 2 Crompt. Prac. 189.

Rawle, for Wilson. The words of the enacting clause are general and unqualified. A judgment on which no *scire facias* shall have been sued out within five years, shall cease to be a lien; that is, the land, after that period, is absolutely exonerated, not as it regards any particular claimant, but as against all the world. As to the force of a preamble, the rule is, that if it be narrower than the enacting clause, and inconveniences may exist to be remedied which are not enumerated in the preamble, it shall not control the enacting clause; nor can the former be properly referred to, to explain or govern the latter, but where the latter is ambiguously expressed. 6 Bac. 380, 381. 1 P. Wms. 520. 4 T. Rep. 793. Cowp. Rep. 543. 5 East, 544, 545. The Act was intended to supply the deficiencies of a former law, and is in fact a supplement to one passed in 1772, c. 680; and therefore it is against all rule to narrow its construction. That law is an exact copy of the statute of frauds in England, and speaks only of purchasers in the preamble; yet it has always been extended farther by construction. The mischief not remedied by that law, was as extensive and as great in respect to creditors as purchasers; and the law under consideration was intended to make the remedy co-extensive with the mischief. Prec. in Cha. 478. 4 Dall. 320.

The idea of notice is altogether inapplicable to this case; because, if an incumbrance be made void by statute, no person coming in afterwards, though with notice, shall be affected by

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the incumbrance. Notice will not make good an act void by the statute. Cowp. Rep. 280.

It was urged, that execution having been taken out within the year, no *scire facias* is necessary. This is the doctrine under the statute of Edward III.; but that statute has a saving in it not to be found in this law. Besides, the *scire facias* mentioned in this law, is a special one, unlike that at Common Law.

Lewis, for Timothy Hurst. The Act extends to the protection of creditors as well as purchasers. He argued in support of the points contended for by Mr. Rawle. Upon the subject of the preamble, he cited 2 Ld. Ray. 1423. 2 P. Wms. 318. The title of a law being the act of the Legislature in this state, is as much a part of the law, and as much to be respected, as the preamble. The title to this law was general as the enacting clause. The inconvenience of old judgments continuing a lien to any indefinite time, is as great in respect to creditors, and particularly so to executors, in the administration of assets, as to purchasers. As to the doctrine on the statute of frauds, he cited 1 Eq. Ca. Ab. 358. 1 Burr. 474. 2 Eq. Ca. Ab. 684.

The preamble and enacting clauses of the Registry Act, correspond entirely. That statute proceeds on the ground of fraud; so do the cases under the docketing law of England; but none of them extend to creditors prosecuting legal means to recover their debts.

The Act of enrolments, 27 Hen. VIII. c. 16, takes no notice of subsequent purchasers, but is general, that no estate shall pass. A deed not enrolled is void, as to all persons whatever. Com. Dig. Barg. and Sale, D. 1 Idem, 543. 1 Inst. 147. (b) Moor's Rep. 34. Sav. 63. Hob. 261, 262. Cases Temp. Talb. 167. 4 Rep. 71. 2 Rolls. Rep. 119. 2 Sand. 11, 12. A recognizance in England, not enrolled, is not a lien, unless the Chancellor allow the enrolment; and when this is allowed, the Court always takes care that it shall not overreach, by rela-

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tion, an intermediate security, obtained by a third person. 2 Vern. 234. 1 P. Wms. 240. 2 Cha. Cas. 47. A judgment not docketed, cannot relate so as to overreach a judgment creditor or purchaser. Prec. Ch. 478.

WASHINGTON, Justice. (*Peters, Judge, absent.*) This being a case of the first impression, and arising out of a state law, I have only to regret that it has fallen to the lot of this Court to give a construction to it, before it had been considered and decided upon by the Supreme Court of this state. A number of cases have been quoted at the bar, which I do not think entirely applicable to this; but as they seem to have a bearing upon it, it may be proper to notice them, and in doing so, I shall, to save time, arrange them in classes. They were read in order to prove, that the enacting clause of a statute may be construed narrower than the words of it import. The statute of enrolments, 27 Hen. VIII. gives rise to the first class; the cases under it prove, that the statute declared that no estate should pass by bargain and sale, unless enrolled in six months; yet that the deed is valid, except as to subsequent purchasers, without notice. The reason of these decisions is obvious. The plain intention of the law was to remedy certain mischiefs resulting from the statute of uses, which, by tolerating secret conveyances unknown to the Common Law, was productive of inconveniences to those who might afterwards become purchasers of the estate, without knowing of such former prior conveyance. The reason for passing the statute did not apply. It would require great ingenuity to give to these cases a shape, which could throw light upon that now under consideration. They do not allude to creditors, and they depend upon the peculiar circumstances which produced the law under which they arose. Cases upon the statute of Elizabeth, to prevent fraudulent conveyances, form the second class. But it is to be remarked, that this statute extends, by express words, to creditors, as well as to purchasers, who are not

bound, though they purchase with notice; and the reason is plain. The conveyance is fraudulent, and fraud at Common Law avoids every act. These cases, therefore, are still most inapplicable than the former. The third class relates to leases by ecclesiastical persons for a longer term than three lives, or twenty-one years. Such leases were considered as void only against the successors, because they alone were intended to be protected by the clear intention of the Legislature.

These cases only prove, that where the intention of the Legislature is plain, that intention will control the positive words of the statute—a position which is not denied, but which, as applied to the present case, is a begging of the question in dispute. The Registry Act of Anne gives rise to the fourth class of cases. That statute avoids all secret conveyances not registered within a limited time, as to subsequent purchasers and mortgagees, for a valuable consideration. The cases decide that such deeds, though not registered according to the requisitions of the Act, are nevertheless good against purchasers with notice. The reason is, that if they have notice, the conveyance is not a secret one, and therefore not within the statute. Next come a class of cases more apposite to the present, and which will deserve more particular notice: I mean those determined upon the statute 4 and 5 W. and M. c. 20, for docketing judgments. It declares that judgments not docketed, shall not affect lands as to purchasers or mortgagees, or have a preference against heirs and executors, so as to affect them. So likewise the statute of frauds, 29 Char. II. declares, that judgments shall be docketed when signed; and that the enrolment of recognisances shall be set down at the margin of the roll, within a fixed time; and that as to *bona fide purchasers* for a valuable consideration, they shall be considered in law as judgments, only from the time they are signed and set down, and shall not relate.

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M'Kim vs. The Phoenix Insurance Company.

M'KIM vs. THE PHOENIX INSURANCE COMPANY.

Insurance.—A policy was underwritten by the Philadelphia Insurance Company, on goods on board the Ann, at and from Baltimore to Jeremie, and at and from thence to Baltimore, 12,000 dollars, valued. After the arrival off the Ann in the West Indies, the owner was informed, by a letter from the captain, that the return cargo would be 112,000 pounds of coffee; and insurance was made by the defendants, stating the cargo at 125,000 pounds of coffee, valued at twenty-two cents per pound, from which was to be deducted 12,000 dollars, insured in the Philadelphia Insurance Company. A total loss took place, and the Philadelphia Insurance Company paid the loss, by compromise, waiving an abandonment.

The policy underwritten by the Philadelphia Insurance Company, must be considered as open on the homeward cargo.

The policy underwritten by the defendants, does not bind them to cover the whole cargo, valued at twenty-two cents per pound, deducting the sum previously insured.

The defendants were not bound to resort to the insurance office in which the first policy was made, to ascertain the precise nature of the same.

By the policy made with the Philadelphia Insurance Company, the underwriters had, in case of loss, a right to as much of the cargo as would, at prime cost, amount to 12,000 dollars; and the second policy, in respect thereto, was void.

The waiver of an abandonment by the Philadelphia Insurance Company, did not affect the relations between the plaintiff and the defendants.

THE court states; that on the 27th of November, 1803; the plaintiff effected insurance in the Philadelphia Insurance Office, on goods on board the Ann, at and from Baltimore to Jeremie, with liberty to touch at any other port at the West Indies, and at and from thence back to Baltimore; 12,000 dollars insured.

A written memorandum was subscribed at the bottom, by which it was declared that the insurance was on flour, dry goods, wine, and provisions, &c. &c., valued at 12,000 dollars,

M'Kim vs. The Phoenix Insurance Company.

clear of premium. The invoice contained the above articles, and some others of no great value, such as candles, tobacco, &c. The plaintiff, after the arrival of the vessel at her port in the West Indies, received a letter from his captain, informing him of the sale of the outward cargo; that he had then on board about 60,000 pounds of coffee, and expected to take in about 112,000 pounds, probably more.

Upon receiving the letter, the plaintiff, in December 1803, directed his agent to insure the return cargo, estimating it at 125,000 pounds of coffee, valued, as concerns this risk, at twenty-two cents per pound; from which was to be deducted 12,000 dollars, insured in the Philadelphia Insurance Office, which would leave 15,500 dollars to be covered.

The agent made out his order on this letter of instructions, and carried it to the office of the defendants, where the risk was underwritten upon the terms mentioned; at and from Jeremie to Baltimore, being on coffee shipped; to be valued at twenty-two cents per pound.

A total loss having taken place on the homeward voyage, the plaintiff gave notice to the Philadelphia and Phoenix offices, and offered to abandon, and to make such cessions as might be proper. The Philadelphia office insisted upon a cession of the whole cargo, which was refused by the plaintiff; the defendants, understanding the nature of the first policy, or from some other cause, refused the abandonment.

After this suit was brought, the plaintiff compromised with the Philadelphia Insurance Office, and gave up his claim of interest, they consenting to pay the principal, and not to require any cession. Instead of 125,000 pounds of coffee, the vessel took in only about 113,000 pounds.

Tilghman and Lewis, for plaintiff, contended that the policy on the return voyage was open, and that the defendant being informed of the prior insurance, which it was his duty to examine, and agreeing to value the whole cargo shipped, at twenty-two cents per pound, did, in effect, agree to pay what

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M'Kim vs. The Phoenix Insurance Company.

ing the premises, such amount being understood to be the whole sum so underwritten; and that the policy, so far as property had been previously insured, should be considered as null and void; and the premium to be returned on so much of the sum so insured, as the defendants were exonerated from by such prior insurance.

The defendants then insured only the property which was uncovered by any prior insurances. This leads to the inquiry, what part of the cargo from Jeremie to Baltimore, had been previously insured; and how much, if any, remained to be covered by this policy. Twelve thousand dollars, clear of premium, had been underwritten in the Philadelphia Insurance Office, on the cargo of this vessel, at and from Baltimore to Jeremie, and back again; and the important question is, whether this latter policy covered the whole, or what part of the return cargo?

The plaintiff contends, in the first place, that the first policy covers 12,000 dollars out of 24,847 dollars and 46 cents, the value of the whole cargo of coffee, at twenty-two cents per pound; and, on the other hand, it is insisted, by the defendant, that, in strictness, the whole cargo is covered by the first policy.

The arguments on which the plaintiff founds his first claim, are, that the policy, though a valued one on the outward voyage, is open as to the return cargo; and that the defendants having been apprized of the first insurance, which covered as much coffee only as the 12,000 dollars would purchase at twenty-two cents per pound, they consented to cover the balance of the plaintiff's interest in the whole cargo; which, valuing the coffee at twenty-two cents per pound, the price it would in the plaintiff's estimation be worth here, would have amounted to 15,500 dollars, the sum insured, if 125,000 pounds had in fact been shipped. To prove that the defendants knew and had it in their power to examine particularly the terms of the prior policy, and that they were content to make this special con-

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M'Kim vs. The Phoenix Insurance Company.

the insured. This point being established, what follows? The plaintiff's counsel say that the defendants have specially agreed to cover the whole cargo, valued at twenty-two cents per pound, deducting therefrom only the 12,000 dollars insured by the first policy. To this conclusion the Court cannot assent.

If the written clause were so express and plain, as to leave no doubt that such was the intention of the parties; and if it appeared that the defendants were fully informed as to the nature of the first insurance, this clause would control the printed clause, important as it is considered by all the insurance offices in this city. Every presumption is against such an intention, and the evidence to prove it ought to be extremely clear and strong. The words, "every pound of coffee shipped, or to be shipped," taken in reference to the words in the order, "*valued, as far as respects this risk, at twenty-two cents per pound,*" and so stating the amount from which the 12,000 dollars was to be deducted, amounted to so plain a declaration that the cargo had been previously valued at twenty-two cents per pound, as to leave no doubt concerning the intention of the defendants, at least, if not that of the plaintiff.

But it is said that the defendants, having been apprized of the first insurance, were bound to examine it, or to take the consequences of their negligence in not doing so. But we answer, that if, in any case, the underwriters are, upon such information, bound to run from office to office to examine papers thus referred to, they were not bound to do so in this case; when the plaintiff spoke a language respecting the nature of the first policy, if not too plain to be misconstrued, yet such at least as was sufficient to mislead.

The order of insurance plainly intimates that only 12,000 dollars were to be deducted from the whole amount of the cargo, whereas it is admitted that in case of loss, the first underwriter would, upon abandonment, have been entitled to so much of the cargo as 12,000 dollars would have absorbed, at prime cost and charges; and the plaintiff would have been entitled to

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claim the value of the same proportion of the cargo. The defendants, therefore, were clearly misled by the manner in which the first insurance was represented to them.

If these were the rights of the parties under the first policy, it follows, that so much of the cargo was covered thereby, as 12,000 dollars would purchase at prime cost and charges; and consequently the second policy, in respect thereto, was, by the terms of it, void.

The defendants, then, are answerable only for so much of the coffee as remained after this deduction is made, at the price of twenty-two cents per pound. Upon the happening of the loss, the plaintiff could certainly have abandoned no more to the defendants, which proves that no more was insured.

It is unnecessary to decide, whether an underwriter may, by an express agreement made at the time the contract of insurance is concluded, bind himself to run the risk of a technical total loss, and yet relinquishing all his right to the thing insured, should any thing be saved; because, in this case, there is nothing which, in any respect, amounts to such an agreement.

This argument on the part of the defendants, cannot be got rid of by the agreement of the Philadelphia Insurance Company, after the loss, to waive all their right to the property which might be saved; because, at the time this policy was signed, it was, by the terms of it, void, except as to the property uncovered by the first; and no future circumstance could give it life, as to the other property, without the consent of the other party to the contract.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, OCTOBER TERM, 1807.

BEFORE { Hon. BUSHROD WASHINGTON, Justice of the Supreme Court.
Hon. RICHARD PETERS, District Judge.

THE ASSIGNEES OF PALMER vs. THE ASSIGNEES OF BLIGHE.

In an action by the endorser of a bill of exchange, against the drawer, it is sufficient to account for the non-production of the bill, that it was lodged with the Commissioners of Bankruptcy, under a commission issued against the drawer, and still remains with them.

It is not necessary that a receipt for the money paid by the endorser to the endorsee, shall be entered on the bill.

THIS was an issue, sent from the Commissioners of Bankrupts, to try whether any thing, and how much, is due from the bankrupt to the plaintiff.

A great part of the plaintiff's demand arose upon bills of exchange, drawn by bankrupt in favour of plaintiff, and remitted to him in Jamaica, to sell, and to remit the proceeds to bankrupt. He endorsed and sold many of them, and remitted the proceeds, together with those of other bills drawn by plaintiff, and sold for the benefit of bankrupt, by his order. The bills being protested, were returned to and paid by plaintiff, as is proved by plaintiff's deposition, taken in this cause, by his clerk, and by a settled account between bankrupt and plain-

The Assignees of Palmer vs. The Assignees of Blight.

tiff, before their respective bankruptcies. Some of these bills having been accepted by the drawee in England, who has become a bankrupt, were sent over and laid before his Commissioners, in order to support the plaintiff's claim for a dividend on his estate. They still remain there for that purpose. Others of the bills were produced at the trial, some with receipts endorsed of the payment by plaintiff; some with blank endorsements, and some with the plaintiff's endorsement to the persons to whom the amount was proved to have been paid, and without receipts or blank endorsements by them.

Rawle, for defendants, contended, that the plaintiff must either produce the bills, or prove them lost, or otherwise account satisfactorily for his not having possession of them; and, that he ought, either to show them with the receipt for their payment by plaintiff endorsed, or with blank endorsements, subsequent to the special endorsements.

By the Court. It is true, the bills should be produced, or otherwise accounted for, by proving them to be lost, or in a situation not to be again brought against the defendants; and the evidence in this case, shows them to be before the Commissioners in England, for the purpose of obtaining a dividend on the estate of the drawee. The evidence, if believed by the jury, proves that they were all paid by plaintiff; which is sufficient, though a receipt for the money was not endorsed on the bills, and though they were not endorsed in blank by the holders, to whom the money was paid.

The plaintiffs obtained a verdict.

The Executors of Cambioso vs. The Assigns of Maffet, a Bankrupt.

THE EXECUTORS OF CAMBIOSO vs. THE ASSIGNEES OF
MAFFETT, A BANKRUPT.

C. and M. were jointly interested in vessels and cargoes, not as partners, but as joint owners in each adventure. The cargoes were shipped to the United States, C. being an alien, and M. a citizen; the vessels being registered by M. as American, and the cargoes appearing to be his property, and entered as such. This action was brought to recover a balance of account arising out of these transactions.

The cargoes were subject to foreign duties, and the transaction being a fraud on the laws of impost and tonnage, cannot be brought into our Courts for the purpose of enforcing a demand arising out of it.

A foreigner is not always bound to take notice of the revenue laws of a country to which he does not belong; and a firm and final contract, made in his own or a foreign country, is valid, although it may be intended to violate the revenue laws of a country with the property obtained from him by such contract, he not being acquainted with the intended fraud. *Aliter*, if the contract is to be completed in, or has a view to the violation of the laws of the country where it is to be executed.

A foreigner trading to the United States, is bound to know our revenue laws, and his ignorance of them will not exempt him from their influence. The property of Cambioso in the cargoes cannot be distinguished from his ownership of the vessels; as those cargoes were subject to foreign duties, being imported in vessels not entitled to an American register.

If any goods imported in these vessels were not subject to duties, their proceeds may be recovered; as the United States were not injured by their importation.

A deposition, in which the witness swore that he had examined, and believes an account against him, to which he refers, to be right, because the clerk who made it out would not have stated it incorrectly, although he has never compared it with the books of his creditor, from which it was taken; may be read in evidence.

The account is not proved to be acknowledged by this deposition, but goes

The Executors of Cambioso vs. The Assigns of Maffet, a Bankrupt.

to the jury, who will decide whether the deposition is sufficient proof of the items contained in it.

The books of the parties to this transaction would not be evidence for either of them, unless supported by other evidence.

THIS was an issue sent by the Commissioners of Bankrupts, to try whether any, and what sum was due to the plaintiff, from the bankrupt.

Maffet's deposition was offered by the plaintiff, and was objected to on two grounds; first, that in right of his wife, the daughter of Cambioso, he was entitled to a part of Cambioso's estate, and therefore the recovery, in this case, would be to his advantage. Second; that he had not released his interest in the allowance to be made him out of the estate in the hands of the assignees.

But a release being produced to the executors of Cambioso, of all interest in that estate; and it appearing that his evidence goes to establish the plaintiff's claim, of course, and to diminish the fund, the objection was given up by the counsel.

The case appeared from his deposition, (so far as it is important to the points of law cited by the counsel,) to be shortly this. Maffet, a citizen of the United States, and Cambioso, an alien, residing at Curracoa, were jointly concerned in a number of vessels and their cargoes; not as general partners, but in each particular adventure. Those vessels were, nevertheless, all registered as American bottoms, as the sole property of Maffet. The cargoes were also all, ostensibly, the property of Maffet, and entered as such. This business was carried on for a considerable length of time, and a large balance is now claimed by the plaintiffs upon the vessels, and another balance upon the cargoes.

To the deposition of Maffet, is annexed the account upon which their claim is founded, and which Maffet says he has examined and believes to be right, but, allowing that he has not compared it either with Cambioso's books, or with his own.

The Executors of Cambioso vs. The Assigns of Maffet, a Bankrupt.

In his cross-examination he says, he believes the account to be correct, because he can see no reason why the clerk of the plaintiffs should draw it off otherwise. The offering this account to the jury was objected to by the defendant's counsel, because it cannot be considered as an acknowledged account; since this deposition was given subsequent to the bankruptcy of Maffet, when he had no interest in his estate, or in the dispute. That the evidence of Maffet speaks of it only to the best of his memory, and rests his belief of its correctness on the supposed integrity of the clerk. It was contended, that as such evidence would not be sufficient to authenticate a deed, or bond, or settled account, in case of the authenticity of the instrument being questioned; neither is it sufficient to authenticate this account, so as to make it evidence to go to the jury. Another reason assigned was, that the evidence of Maffet was inferior to his books, and those of Cambioso, which might have been produced.

Washington, Justice. The argument of the defendant's counsel proceeds upon two mistakes; first, that this account is offered as a settled account, which I do not understand to be the case, and which certainly it could not be. The account is not of itself evidence of any debt; it is a mere exhibition of the items of the debt, which must rest upon, and can only be supported by other evidence. If the witness in this case had sworn positively that, to his perfect recollection, every item in this account was correct, it is clear, and it is admitted, that such testimony would establish the demand, unless such evidence was contradicted, or the witness discredited. In such a case no objection could be made to the account being read, as containing the items of the demand; but still the evidence, not the account, would be the foundation of that demand. But the witness does not swear positively; yet this is no objection to the offering the account, and it will be for the jury to say, if the evidence to prove the items in it is sufficient to satisfy them. Again, the witness is not only not positive in his evi-

The Executors of Cambioso vs. The Assigns of Maffet, a Bankrupt.

dence, but he assigns, it is said, a bad reason for believing it to be correct. This goes still further to weaken his evidence; but the evidence is equally competent, though not equally strong. These considerations may be properly urged to the jury, who are judges of the weight of evidence, and of the credit of witnesses; but they do not affect the admissibility of the evidence. The second mistake is, that the books of Maffet and of Cambioso, are better evidence than the testimony of a witness, to establish this account, and therefore such inferior evidence is inadmissible. I think quite otherwise. Cambioso's books would not be evidence at all for him, nor Maffet's for the defendants, unless supported by other testimony; and though they might be evidence against them, yet they are not of superior dignity to a witness proving the same fact. This case is very unlike that put at the bar, of a bond, which ought not to be proved on *non est factum*, by evidence similar to what is given by Maffet in this case. In that, the *paper itself* is evidence of the debt, and the witness is only examined to authenticate and verify the paper, so that it may be read. Then, if the witness should say that he believed the bond to have been executed by the obligor, because of his confidence of the correctness of those who appear as witnesses to the execution, the Court would lay its hands on the paper, and say it was not sufficiently authenticated to make it evidence to be laid before the jury. But in this case, the account is not evidence that a shilling is due. The witness is not called upon to authenticate the paper, but to prove the truth and correctness of the items in it. I do not rely upon the evidence of Maffet as the acknowledgment of the party, because it was made after he had ceased to have an interest in the estate, but as the evidence of a witness of whose credit the jury is to judge.

Judge Peters concurred.

The defendants' counsel, after endeavouring to impeach the credit of Maffet, and to show the insufficiency of his evidence to establish the account, contended, that the whole of the de-

The Executors of Cambioso vs. The Assigns of Maffet, a Bankrupt.

mand, arising from the transactions in violation of the revenue laws of the United States, cannot be enforced in any of the Courts of the United States. They read the different revenue laws, to show that a vessel cannot obtain an American register, so as to exempt her cargo from the payment of alien duties, where a foreigner is partly interested in the vessel; and that the American registers for these vessels were obtained by the perjury of Maffet. See Acts of Congress, Vol. II. p. 131. 144. 4 Idem, 342, s. 36. 1 Idem, 251, s. 2; also the following cases, to prove the general principles: 4 Dall. 299. 308. 342. 5 T. Rep. 594.

That if it were necessary to bring home to the foreigner a knowledge of the laws of the foreign country, Cambioso was bound by the knowledge of Maffet, his partner and agent. 3 T. Rep. 454.

For the plaintiff, it was answered, that the principle does not apply to foreigners, unless they are proved to have known of the laws they have violated, and that they have been so violated: that it should appear that Cambioso knew of the revenue laws of the United States, and also that Maffet had registered the vessels as his sole property. This appears to have been relied upon in all the cases on this subject. 3 T. Rep. 454. 4 Idem, 46.

That if the objection should apply to the balance claimed on the vessels, still the claim is separable; 3 Vez. jun. 373; and the objection is inapplicable to the balance claimed on the cargoes, unless express notice can be proved; for, though an alien cannot be a part owner of an American registered vessel, yet he violates no law by being concerned with a citizen in the cargoes carried in an American registered vessel, for he pays no higher duties in such a case than a citizen; all depending on the character of the *vessel*, not of the *person*.

In the third place, it was contended, that if the law be against the plaintiff, as to the balance claimed on account of the vessels and cargoes, subject to pay duties; still it does not apply

The Executors of Cambioso *vs.* The Assigns of Maffet, a Bankrupt.

to a part of the plaintiff's demand, on those portions of the cargo which paid no duties at all.

WASHINGTON, Justice, delivered the charge of the Court. The only part of the case which the Court will notice, is the point of law which has been raised; as to the weight of the testimony, or credit of the witness, the jury will judge.

The facts on which this point rests are few. Cambioso and Maffet were jointly interested in a number of vessels, and in the cargoes shipped on board of them to this country, upon which transactions distinct balances are stated in favour of Cambioso, and are now claimed by his executors. Maffet was an American citizen residing in Philadelphia, and Cambioso an alien, residing in Curacao. Under the laws of the United States, nothing could protect these parties from the payment of alien duties, on the vessels or on the cargoes, (except such parts as were not dutiable at all,) but an American register. This, however, could not be obtained, in consequence of Cambioso's being an alien. If obtained, it must have been by a concealment of his interest, and by the perjury of him in whose favour the register was granted. Yet it appears that such registry was obtained by Maffet, as the sole owner of these vessels; and in consequence of such concealment and perjury, a number of mercantile adventures were carried on by Maffet and Cambioso, on which this claim is founded, for considerable balances in favour of the latter.

The defendants insist that this claim cannot be enforced in the Courts of the United States; because those Courts cannot lend their aid to establish a demand founded upon a violation of the laws of the United States. This principle of law may not, in a moral point of view, destroy the right of the plaintiff; but it goes to defeat his remedy in the tribunals of this country. The soundness of the principle, as a general one, is acknowledged by the plaintiffs' counsel; but it is contended to be inapplicable to foreigners, who are not bound to take notice

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of the revenue laws of a foreign country, unless proof is brought home to them of a knowledge of those laws, and of every fact necessary to apprise them of the breach of them.

But, we do not understand how a knowledge or ignorance of the foreign law can be important; for if a foreigner is bound in any case, to take notice of such laws, it is no defence for him that in fact he did not know them. It was his duty to know them, and his ignorance shall not excuse him. If he is not bound to take notice of them, then it is of no consequence whether he did or did not know them.

In some cases, a foreigner is not bound to take notice of foreign revenue laws. For if he makes a firm and final contract, completed in his own or a foreign country, it is nothing to him whether a use may, or may not be made of the contract in violation of the revenue laws of a foreign country. In the case of Hollman and Johnson, Cowp. 341; the sale was completed in France, and the vendor was, in no respect, concerned or aiding in the illicit use intended to be made of the goods, though he knew of such intention. Not so as to a citizen, who, though the contract be complete, yet, if he be knowingly instrumental to a breach of the laws of his own country, he cannot have the aid of those laws against which he has offended. As if he sell goods for the purpose of their being smuggled; lends money to a person at a gaming-table, for the purpose of enabling the borrower to violate the law against gaming; or the like.

But if the contract of the foreigner is to be completed in, or has a view to its execution in a foreign country, and is repugnant to the laws of that country, he is bound to take notice of them. If so, how much stronger is the case of a foreign merchant, owning property and carrying on trade in another country, by means unauthorized by, and in violation of the laws of that country? In such case, he is not only presumed to know, but is bound to take notice of them. He contracts and does business under the faith and sanction of those laws; and shall

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a violation of the revenue laws: As Cambioso gained nothing, and the United States lost nothing, by a concealment of his interest in these goods, or in the vessels; there was no such fraud as would vitiate his demand for any balance due on their account.

It was contended that Cambioso, by sending to Maffet documents respecting the cargoes as belonging to Maffet, enabled him to commit perjury in the oath which he took at entering them, and that thus participating in this immorality, he ought not to recover.

But it by no means appears that the oath taken by Maffet on entering such goods as his sole property, was even false, much less that it was perjury. We do not observe the oath or any part of the law requires that all the partners should be named. The object of the law is to insure the payment of duties, and not to disclose the names of the owners of the property. The adoption of the doctrine contended for, might be extensively mischievous to dormant partners.

But even admit that a false oath was taken by Maffet, by means of the papers sent to him; we do not perceive how this can affect the right of Cambioso to recover the value of these goods sold by Maffet, for which he was justly indebted to Cambioso. Cambioso violated no law of the United States, in concealing his name as part owner of these goods.

Verdict for defendants.

Hare and Dallas, for defendant.

J. Ingersoll and Rawle, for plaintiff.

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Surita vs. The Insurance Company of North America.

examined, packages opened, &c., but nothing was taken; and all was afterwards put to rights. Between Jamaica and La Vera Cruz she suffered much injury in a gale; but she arrived at La Vera Cruz, where the governor would not permit her to land her cargo, or even to remain for the purpose of repairing and getting water. In this situation she left that port, intending to call at the first she could reach. She afterwards got to New-Orleans, from whence, on the 4th of January 1803, the supercargo wrote to the plaintiff, informing him that he could not dispose of his cargo at New-Orleans, and should therefore go to the Havana and sell it. He referred to a letter of the 26th of December, (not produced at the trial, or called for,) but did not expressly mention the circumstances which had occurred at La Vera Cruz; though he speaks of the injury the vessel had suffered on her voyage thither, and states his intention to have her repaired at New-Orleans. On the 18th of January he mentions, that Havana being, as he has just understood, shut against foreigners, he shall endeavour to sell his cargo at New-Orleans.

On receiving this letter of the 4th, the plaintiff went to the office of the defendants on the 11th of February, and prevailed on the defendant to endorse on the policy of the 9th of October, a memorandum, which states, "that it being represented to them by the plaintiff, that the vessel had arrived at New-Orleans, and would go to Havana, it is agreed, that in consideration of a half per cent. additional, the said vessel may go to Havana, and thence to New-York, without prejudice to the insurance. The cargo was in fact landed at New-Orleans, where a cargo of cotton was taken in, with which the vessel sailed and arrived in safety at New-York.

Merrellth and Tilghman, for the plaintiff, contended; first, that the risk never attached under this policy, since no cargo was taken in at La Vera Cruz. They referred to 3 Caines's New-York Rep. 339, being an action on a similar policy on this cargo, effected at New-York. Second; that the case is not altered

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Scriba vs. The Insurance Company of North America.

sion, is not founded in law. The adoption of it would lose these pounds, where they would gain dollars. This, however, forms no part of our consideration; whether it work to their benefit or injury, we have nothing to do but to pronounce the law, without considering how it may affect the parties on either side. The first point made at the bar is so extremely plain, that it is difficult to frame an argument which can throw additional light upon it. To the validity of every contract, there must not only be an agreement of parties, but there must be a subject matter for that agreement to operate upon. A policy effected upon a particular cargo, constitutes an agreement to that extent. But if no such cargo is shipped, or if the risk agreed to be insured never commences, there is not a subject matter to which this agreement can apply; and of course there never was a valid contract—one of the essential requisites to all contracts being wanted. Apply this principle to the present case. The original agreement between these parties, was for an indemnity upon goods laden, or to be laden at La Vera Cruz; the adventure or risk to commence from, and immediately after the loading of said goods on board the Alert, at La Vera Cruz. But no goods were laden at La Vera Cruz on board of this vessel. The subject matter, therefore, of the agreement never existed, and consequently there never was, at any time, a valid and complete contract between the parties. This is plain, not only upon the words of the agreement, but upon the intention of the parties, which corresponds with their expressions; for it is absurd to suppose that either of them contemplated an insurance of goods sent from New-York to La Vera Cruz, and intended of course to be sold there. The memorandum of the 11th of February, endorsed upon the policy, has furnished the only plausible ground for an argument by the defendant's counsel. But, it is obvious that the decision upon the first point, is conclusive as to this; for if there never was a contract between the parties, as to the subject matter of this policy, this memorandum, which relates to another sub-

Scriba vs. The Insurance Company of North America.

ject, and is merely superadded to the policy, cannot constitute a contract. The defendant's counsel, through the whole of their argument, have treated this memorandum as a new contract; and to a certain extent it is so.

It is an agreement to permit the vessel to touch at Havana, on paying a half per cent. for the indulgence; but it is a very great mistake to consider it as a new contract of indemnity, the reverse of which it professes to be. It is true, that if the parties, being both fully apprized of all that had occurred, had in this memorandum agreed, in express terms, or such as plainly indicated this to be their meaning, that the original policy should attach to the cargo brought from La Vera Cruz, the cargo in such case would be considered as covered by the policy. No particular form of words was necessary, if the intention, upon a full knowledge of all material facts, was plainly expressed. But such a knowledge of facts was not possessed by the parties. Both of them, it is plain, acted under a mistake in point of law; and the defendants, (if not the plaintiff) under an ignorance also of facts, that the policy did attach upon, and did cover the cargo brought from La Vera Cruz. But such mistake cannot prejudice either party, and the memorandum, instead of indicating a design in the parties to cover, by a new agreement, this cargo, by the original policy, is plainly inapplicable to that subject; is confined to a new one, or subsidiary altogether to the original agreement, which never at any moment took effect. The parties treated the first agreement, on the 11th of February, as a subsisting contract; but this could not make it a valid one, if in point of law, it never had existence.

The case put at the bar, of a forfeited lease, and subsequent receipt of rent by the landlord, is good law; but there the contract was once valid, though forfeited at the option of the landlord. Yet it was in his power to waive the forfeiture if he pleased; and the receipt of rent, he being fully apprized of all circumstances, amounts to an implied waiver of it. A case of

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insurance may be mentioned, apposite to this. If the risk in this case had once commenced, but the right to claim an indemnity in case a loss had happened, had been forfeited by a deviation or the like, the defendants being informed of the fact, might have waived the forfeiture, and possibly a memorandum of this kind might have had such an effect; certainly if such had appeared to have been their intention, it might have been so construed. But, if, as in this case, there never was at any time a valid contract, no implied ratification could make it a subsisting contract in this case, any more than payment of rent for white acre, where only black acre had been leased, would constitute a lease for white acre. The truth is, that this cargo never was covered, any more than if the policy had been made, and specifically, upon a cargo of rum, and a cargo of cocoa had been taken; no posterior act therefore could cover it, but a new contract going to that extent.

As to the third point, little need be said about it, as the plaintiff is clearly entitled to recover upon the first ground. But if it were necessary to decide it, it would be sufficient to say, that if in your opinion the vessel was not seaworthy at the time the risk commenced, if it ever had commenced, neither party was bound; and of course the defendant could not retain the premium in case of safe arrival; nor could the plaintiff have recovered a loss, if one had occurred.

Verdict for Plaintiff.

 Graham vs. The Pennsylvania Insurance Company.

GRAHAM vs. THE PENNSYLVANIA INSURANCE COMPANY.

Insurance on goods on board the Concord, at and from her port or ports, place and places of loading in Honduras, to Liverpool; warranted free from loss in consequence of, or detention on account of, any illicit or prohibited trade. The vessel was captured in the Bay of Honduras, by a British vessel, as prize; on the allegation that she was taking on board mahogany of larger dimensions than was allowed to American vessels; and while on her passage to Jamaica, she, with the capturing vessel, was lost.

Privileges given to vessels to cut mahogany, under the treaties between Spain and England, of 1762 and 1783. What is the proper construction of those treaties, and of the proclamations and laws relative to the trade under them, which have been issued or ordained by the English government.

It is no objection to giving in evidence a bill of lading and invoice, which have been made out after the usual and regular time, if the circumstances under which the vessel and master were, prevented their being made out at the common period.

The invoice of the cargo is, against the general principles of evidence, uniformly admitted as *prima facie* evidence of the value of the cargo; and no more. It is not necessary to show its correspondence with the books of the party producing it.

THIS was an action upon an open policy, dated the 16th of February 1805, underwritten by defendants for 10,000 dollars, on goods on board the Concord, at and from her port or ports, place or places of loading, in Honduras, to Liverpool; warranted by the assured free from any charge, damage, or loss, which may arise in consequence of a seizure or detention of the property, for or on account of any illicit or prohibited trade. The insurance was declared to be on mahogany and dye-woods.

The vessel was American, chartered in Philadelphia, in September 1804 for this voyage, by the plaintiff, a British sub-

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ject, resident within the limits of the British settlement in Honduras. She arrived at Honduras in November 1804, and proceeded to Bellize, within the British settlement, where she took in a quantity of logwood, and then fell down to the Rio Grande, without the English limits, and within those of Spain, carrying a sworn measurer from the Bellize; and there took in more than half her load of mahogany, which generally exceeded twenty inches diameter, in its largest dimensions.

Before she had completely taken in her load of mahogany, and whilst engaged in doing so, she was, on the 27th of January 1805, captured by a British vessel as prize; the alleged reason was, that she had on board mahogany of a larger size than was permitted to be exported by the regulations of the British settlement at Honduras. After the seizure, there being a part of the mahogany alongside for completing of the loading, it was taken in, by permission of the captor. The prize was first carried to Bellize, and thence proceeded with the capturing vessel to Jamaica; but on her passage thither, both vessels were lost on the Florida coast, on the 6th of March 1805.

Some evidence was given of a usage for the settlers within the British part of Honduras, to cut and export mahogany from the Spanish territory, sending cutters and sworn measurers to aid in the business.

When the Concord first left the Bellize, she received, from the superintendent there, a clearance for the logwood, and for a blank number of feet of mahogany, (for at that time she had none on board;) with a permit to carry the same to Liverpool; and a certificate, that bond had been given by the said Graham, that he was a British subject, and would carry his said cargo to Liverpool, and not land it in the United States.

By the treaty of 1762, between Spain and England, the former ceded to the latter the right of cutting and exporting logwood from a certain district of country on the Bay of Honduras; and, by the treaty of 1783, the limits of this settlement are fixed, extending from Rio Hondo on the north, and Sibor on the

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south, including the Bellize within those limits. The convention of 1786, between these powers, extends the privileges before granted to the cutting of all other woods within that settlement, and gathering the natural fruits of the earth; but not to the cultivation of the land, or the erecting of manufactories. The treaty of 1783, contained an express reservation of the sovereignty of Spain over this territory; and the convention of 1786 stipulates, when wood should become scarce within the British settlement, that the settlers may cut it without their limits, paying a just price therefor.

The government of the British settlements is vested in a superintendent, appointed by the crown, who appears to unite legislative, judicial, and executive powers within the same; but who acts under instructions from the king in council, previously given, or by his approbation, afterwards given, to his acts.

On the 14th of July 1804, the superintendent issued his proclamation, reciting that mahogany exported from that settlement to America, is limited, by instructions of his majesty, to seventeen inches diameter, and that an application had been made to him, by the magistrates of the settlement, and a committee, to extend the permission to the diameter of twenty inches. He therefore declares, that all vessels trading from any place in the Bay of Honduras, where British settlers are permitted to cut mahogany, to any part of the United States, may take on board and carry away mahogany, not exceeding twenty inches; such vessels coming to, and clearing out from the Bellize, and the owner or consignee entering into bond, not to cut or carry away any mahogany to the United States, exceeding the size thereby allowed.

On the 11th of October 1804, the superintendent issued a second proclamation, reciting, that by his former proclamation of the 14th of July, mahogany, not more than twenty inches, was permitted to be shipped on board *American or foreign bottoms*, which permission had been highly disapproved by the

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commander-in-chief of Jamaica and its dependencies; therefore it is ordered, that mahogany, measuring more than seventeen inches, will not be permitted to be exported from this settlement in any *American or foreign vessel*.

It appeared by the depositions of a number of witnesses, then resident in the British limits of Honduras, and who had long resided there, that they knew and had heard of no Act of Parliament, orders or instructions of the British government, forbidding the exportation of mahogany of any size from that settlement to Great Britain; and many of them stated, that such were their situations, that had any such ever issued, they must have known it; and that in that trade, and in this respect, they knew of no difference between British and foreign vessels.

The right of the plaintiff to recover, was opposed upon two grounds: first, that the warranty was not complied with; and secondly, that a deviation was committed. On the first, it was argued, that though in fact the mahogany, the article prohibited on account of its size, was taken in without the British limits, yet the vessel, having received her regular clearances and permit from the superintendent of the settlement, and having given bond to carry it to Liverpool, it must be considered as an exportation from that settlement, by a British subject, resident there. If so, it was clearly prohibited by the general and unqualified expressions of the second proclamation; which interdicts the exportation of mahogany, above seventeen inches, from that settlement in foreign vessels. But, even if the exportation should not be considered as from that settlement, the having on board papers to show that this was the fact, was as much a breach of the warranty, as if the fact had been so. It would equally have led to a condemnation.

If the trade was prohibited, the license of the superintendent and the clearance at Belize, will not legitimate the transaction; since no part of the mahogany was on board when these papers were made out; and it is to be presumed, than when the wood

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should be taken in, it was to be of the size permitted to be exported.

Secondly, there was a deviation. On this point it was insisted, that from the circumstance of the insured being a British subject, resident in the British settlement at Honduras, who could not legally trade with the enemies of his country; (for on the 11th of January 1805, war was declared by England against Spain,) and if there had not been war, who was prevented by the treaties subsisting between those powers, from cutting wood without the British settlement; it must have been understood between the plaintiff and defendants, when this policy was made out, that the risk was to commence from the loading of the vessel at a port in the British settlement in Honduras, and not Honduras generally, as expressed in the policy.

Thirdly; it was contended that the defendants, at all events, are not liable to pay for the mahogany taken in after the capture.

It was answered by the counsel for the plaintiff, first, that if the exportation had been from the British settlement at Honduras, yet there was no law or proclamation which forbid foreign vessels from carrying mahogany of any size to England. The policy of the British government, which was to procure for the mother country the best wood, whilst that of inferior quality was allowed to be transported to other nations, will throw light upon the construction of the proclamations. The first is confined, exclusively, to mahogany, to be exported to the United States in any vessel. It was this permission which was disapproved by the commander-in-chief at Jamaica, and it was on this account that the second proclamation was issued, reducing the size to seventeen inches, as it stood before the first was issued. The second proclamation, then, ought to be construed so as merely to operate as a repeal of the first, and not to be more extensive than it.

Upon the second point, they relied upon the words of the policy, which extend to every part of Honduras, and which

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cannot be restricted now. Third; it was insisted that the captain was not prevented by the capture from taking in a full cargo purchased, and lying alongside of the vessel when the seizure was made; and this was done with the permission of the captor.

Washington, Justice, asked the plaintiff's counsel, if the relation back of the property to the capture by the abandonment, did not furnish an argument against the claim of the plaintiff to an indemnity for the cargo taken in after the capture?

WASHINGTON, Justice, delivered the charge to the jury. This is a case of some difficulty, and of considerable interest. It deserved and has received an able discussion at the bar, and a patient examination by the Court and jury. Thinking that the cause must turn entirely upon the warranty, we will at once clear it of the other subjects which have been presented to our consideration. It has been insisted, that the policy was avoided by a deviation from the voyage insured. This point is not to be maintained. The words of the policy are plain, general, and unqualified. The places at which this vessel was to take in her load, are stated to be *in Honduras*. All parties knew that this expression comprehended the whole of the Spanish possessions on the Bay of Honduras, as well as the small portion on the bay possessed by the British. Had they intended to confine it to that part, nothing could have been more easy or more natural, than to have inserted words to express such intention. There is nothing on the face of the instrument itself, or in the evidence, which can warrant the position, that they meant differently from what their language declares; and it would be a dangerous experiment, in such a case, to leave a certain and safe guide, with which the language of the parties furnishes us, to wander in the unsatisfactory field of conjecture, as to their probable meaning. No aid can be drawn from the situation of the plaintiff, or from that of his country, in relation to Spain. Though a resident in the British settlement, it did not follow

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that if others took wood from the Spanish port, he should not do so: and indeed it appears, that it was common for vessels to fall down from the Bellize, and to take in their mahogany at Golden River, or Rio Grande, as was done in this case. This custom, if it is sufficiently proved to your satisfaction, ought to have been known to all parties, and not being excepted against, affords a strong reason for believing that they did not mean to restrict the places of loading.

The next question is, has the warrant been complied with? It struck the Court during the trial, and we have hinted it to the bar, that this might probably be objected to as an illicit trade, being repugnant to a general principle of English law, if carried on by a British subject, with a dependency of Spain during war, or repugnant to the treaties between England and Spain, if it took place during a time of peace; for, as war was declared on the 11th of January 1805, and she took in part of her load before, and part after that period, it might be well to consider the relative situation of the two countries at those periods. But, upon reflection, there does not appear to be much weight in those objections. There was in fact no trading with the Spanish part of Honduras; but the wood was cut and taken, so far under the authority of the superintendent of the English settlement, that wood-cutters and sworn measurers were sent down with the vessels. If then the wood was taken in time of peace, it was permitted by an article of the convention of 1786, when wood should become scarce in the British settlement; and as it appears by the evidence, that the Concord did no more than had been practised before, it is fair to presume that the event had taken place on which this right might be exercised, and that it was tolerated on the part of Spain. And this is in no small degree strengthened by the circumstance mentioned at the bar, that this conduct of the British settlers is not to be found in the list of complaints, set forth in the manifesto issued by Spain, on the breaking out of the war.

If, on the other hand, the wood was taken during the war, it

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On the 14th of that month, issued his proclamation, and in opposition to his instructions, permitted the exportation of mahogany, not exceeding twenty inches, in any vessel of the United States.

On the 11th of October 1804, he issues his second proclamation, misreciting the purport of the first, as if it had extended only to foreign vessels, going with wood to any part of the world; and stating the disapprobation of his government of the permission granted by that proclamation, he forbids the exportation of mahogany, above seventeen inches, from that settlement, generally; without confining the exportation to any particular place. It is the generality of the expressions in this proclamation, which creates difficulty in the cause.

It must be admitted, that, taking the words literally, they comprehend an exportation in a foreign vessel to England, as well as to the United States; and the question is, whether the instrument ought, upon legal and rational principles, to be so construed. The difficulty is increased by the misrecital of the first proclamation, so as to induce an argument that it was not the proclamation, but the recited permission, which was disapproved. But there are, nevertheless, the strongest reasons to conclude, that the reference was intended to be to the proclamation. The date of the first proclamation is correctly stated, and it does not appear that any other of that date, or indeed of any prior date, had been issued respecting this trade. It is, therefore, rather to be presumed, that he mistook the purport of that proclamation, than that he had in view any other permission granted by him, except what that proclamation contained. The second professes to recite the first, and by stating the disapprobation which the first had received, it affords the true cause for making the second. If the latter be construed as going no farther than to repeal the former, it will reach exactly as far as the mischief, and no farther. If it be taken literally, it will go beyond the mischief, without an apparent cause for it, as well as against the policy of the British government,

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in respect to this trade. Besides, a literal construction will have the effect to set up the proclamation, and to make it ~~the~~ amount to the existing law of the settlement; which, as has been stated before, tolerated the exportation of mahogany of any size, and in any vessel, to Great Britain; whereas the words used would interdict such exportation in foreign vessels.

Another strong reason against the construction was mentioned at the bar, viz., that the bond, which was directed to be given under the first proclamation, was conditioned that the mahogany should not exceed twenty inches, permitted by the proclamation to be exported to the United States; but no stipulation in it extended to mahogany of any size, if exported to England. On the other hand, the bond actually given by the plaintiff in this case, is silent as to the size of the wood, but contains an express obligation that the wood is to be exported to Liverpool, and shall not be landed in the *United States*; thus showing the sense of the government as to the policy, as well as to the true import of the regulations on this subject. Upon the whole, then, it seems to us, that the second proclamation does not make this exportation illicit, and of course that the warranty has not been violated.

As there is some little diversity of opinion in the Court respecting the third point, and it is of no great consequence as to the value, that point will be left to the jury.

In the opening, on the part of the plaintiff, his counsel offered a bill of lading, signed by the captain on the 16th of February 1805, eighteen days after the capture, but before the loss, and before the vessel left Honduras. This was objected to. The Court admitted it to go to the jury, observing that though, according to the regular course of doing business, the bill of lading is given on taking in the cargo, and in general, if given so long after, as in this case, would create a suspicion of fraud, so as to invalidate it; yet, that if a fair reason can be assigned, there can be no ground for a charge of fraud. Such a reason

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Evans vs. Chambers.

EVANS vs. CHAMBERS.

Action for a violation of a patent-right.

If the allegations and suggestions in the petition for a patent are substantially recited in the patent, it will be sufficient; but the omission to do this will invalidate it.

THIS was an action for infringing the plaintiff's patent-right, to certain improvements made in the manufactory of wheat, &c. by means of a hopperboy. The petition, the patent, dated 18th December, 1790, and the specification, were read; with proof that the defendant had erected similar machinery in his mill without permission.

Hare and Binney, for plaintiff.

Rawle, for defendant.

A nonsuit was moved for on the following grounds. First; that the patent does not recite that a petition was presented, and the suggestions and allegations of which are recited in the patent. It begins with reciting, that the plaintiff "hath invented," &c. Second; the allegations and suggestions of the petition are not recited. Third; there is an interlineation in the patent, and it is this alone which speaks of the hopperboy. This avoids the patent, as it will any deed. That it was interlined after-executed, is to be presumed, 1 Dall. 64. Fourth; it does not appear that the patent was recorded. Fifth; the patent is for more than the discovery, and it is therefore void; Bull. N. P. 77. The discovery is only of the cross piece to the upright shaft for moving and cooling the flour; and it has been proved that the upright shaft, with a different kind of cross piece, had been used long before the date of this patent; so that the patent gives the exclusive use to that in which the plaintiff was not entitled to the exclusive property.

PENNSYLVANIA,

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For the defendant, it was stated, that the law does not require that the presentation of a petition should be recited. Second; we have produced the petition, and the material suggestions are recited. Third; it is too late to object to the patent, on account of the interlineation, after it has been read. Fourth; the recording of the patent is merely directory to the officer. The right vests independent of it, by the express words of the act of 1790. Fifth; the patent only grants a right to the upright shaft, and the other parts of the machinery, with the improvement of the hopperboy annexed. No person is precluded from using every part of the machine, without the newly invented hopperboy.

By the Court. The second ground for a nonsuit is not to be gotten over. If the allegations and suggestions of the petition are substantially recited, it will be sufficient. But in this case they are not. All the recitals in the patent refer to the elevators, and other parts of the mill machinery, except, that the use of the hopperboy is incidentally mentioned; without any description of its use, and the manner in which it is to work. But the petition gives a minute and full description of it, which substantially ought to have been recited; particularly in this case, where the patent does not in any manner refer to the petition which has been read. Not that we mean to say that such a reference was necessary, if the suggestion of the petition had been substantially recited.

Nonsuit awarded.

Hurst vs. Hurst.

CHARLES HURST vs. TIMOTHY HURST.

In equity. The plaintiff filed a bill for relief, from a judgment entered on the award of referees, claiming to have certain credits allowed to him, which had not been given to him in the accounts, stated and adjusted between him and the defendant, upon which the award was given.

Plain mistakes in facts, which appear upon the face of the award, or which could be made out from the evidence laid before the referees, or for their examination; might have been taken advantage of by exceptions to the award; and these cannot afterwards be made the subject of a claim to relief in equity.

The bill cannot be supported as a bill of discovery, because the plaintiff does not state that he relies on the discovery to be obtained for the defendant, but that he can prove the mistakes of the arbitrators.

THE plaintiff filed his bill praying relief against the award of arbitration, which had been approved by this Court, after exceptions had been taken to it; and upon a *scire facias* issued thereon, judgment had been obtained.

The bill states that against the sum of 13,085 dollars, 72 cents, awarded to the defendant, the referees had not allowed the following credits. First; the sum of 10,382 dollars, 96 cents, (being Barron's proportion of the property), advanced by the plaintiff, on the general account of the persons engaged in the land purchases; that this credit was not admitted, because the plaintiff had received from the proceeds of sales of divers parts of a South street lot, a sum equal to the whole sum he had advanced, which the bill states was in effect giving to Barron one-fifth part of the sales of this lot, though he had sold his interest therein to the plaintiff. Second; that the referees omitted to credit the plaintiff 2,690 dollars, 67 cents, being Barron's one-fifth of other sums expended by the plaintiff for the same con-

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cern, as appeared by an account exhibited to the referees, and admitted by the defendant; that the plaintiff has heard, that this credit was not given, under the supposition that the plaintiff was indebted to Barron five hundred pounds, for a purchase in 1774, of all Barron's interest in five thousand acres of land, which sum of five hundred pounds, with the interest was equal to the credit claimed. Whereas, the plaintiff, had he known of this mistake in the referees, could have made it appear by sufficient evidence that he had satisfied Barron for his part of the above land, and for other land in Bedford county, and of certain sums paid for Barron.

The second ground of complaint against the award is, that the referees have given credit to the defendant, as assignee of Barron, who was assignee of Israel Morris; for £758 3s. 4d. due to said Morris; whereas the plaintiff has been informed, and believes, that no assignment was ever made by Morris to Barron; and in fact, Morris has brought a suit against the plaintiff, which is now pending, to recover this very sum of money.

To this bill a general demurrer was put in.

The cause was argued by Hopkinson and Levy, for plaintiff; and Ingersoll and Lewis, for defendant.

WASHINGTON, Justice, delivered the opinion of the Court. The reason assigned in the bill for the relief prayed is, that the above omissions to credit the plaintiff, as well as the charge of £758 3s. 4d., are plain and evident mistakes, which a Court of Equity ought to correct. When these points were argued, on exceptions to the report of the referees, the Court laid it down, that plain mistakes might be examined into at law; not only such as appeared upon the face of the award, but such as could be clearly and palpably made out by the proofs laid before the referees, or acknowledged by them. The plaintiff therefore had a complete and adequate remedy on the other side of this Court, and either pursued this remedy ineffectually, or

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neglected it; in either of which cases, ought a Court of Equity to interfere, merely upon the ground that these mistakes exist?

The plaintiff's counsel seems to have been well aware of this dilemma, and therefore has very prudently attempted to support this as a bill of discovery. But if this be such a bill, so is every bill in equity. It is not pretended that the facts can only be got at, by a disclosure to be forced from the defendant; on the contrary, it is stated, that the accounts on which the plaintiff's two credits are founded, were admitted by the defendant before the referees. There seems to have been no defect of proof before the referees, nor indeed from the nature of the transaction could there well be any, as to the first credit claimed; and if there were a mistake, it must have been, as a stated bill, one which proceeded from error in the judgment of the referees. But this did not appear to be the case, when all the evidence was before the Court, on the former occasion. As to the second credit claimed, the bill avers that the plaintiff can prove, by good and sufficient evidence, the facts material to establish it; as to this, then, a discovery is not required.

So too, as to the credit claimed by the plaintiff of £758 3s. 11d., so far from its having been refused, because it was not in the power of the plaintiff to establish it by proof, we must suppose that such proof was laid before the arbitrators, not only because the contrary is not stated, but because the referees are charged with having made a plain mistake in disallowing it: at the same time, should J. Morris recover a judgment against the plaintiff, upon the ground that the assignment to Barron was not made; I will not say that the Court ought not, in that case, to relieve the plaintiff.

Demurrer allowed, and bill dismissed with costs.

Gernon vs. Boecaline.

GERNON vs. BOECALINE.

The District Judges of the Courts of the United States have no authority to issue writs of *ne exeat*.

The affidavit upon which this writ will issue, should be positive to a debt, or to the belief of the plaintiff, that a certain balance of account was due. The plaintiff was admitted to amend his affidavit; and being sworn, at the instance of the defendant, he was permitted to state, that a particular item of his claim had not been passed upon by arbitrators, who had examined the accounts between the parties.

A *NE EXEAT* had been awarded in this case, by the District Judge, and bail taken. A motion was now made to discharge it, on the ground, that the District Judge had no power to award it. Upon this ground, the Court quashed the writ.

The plaintiff then moved to award a new writ, which was objected to by Levy, for defendant; the plaintiff having stated, that the bill is filed on account of a particular transaction, in a certain vessel, which transaction has been referred, and was settled, as appears by an item in the account, on which the arbitrators acted, in which they credit the defendant 9,000 dollars, on account of this vessel and cargo. Secondly; that the affidavit is insufficient, as it merely states that the plaintiff has a just demand against the defendant; whereas, if he claimed a debt, he should have stated positively, that so much was due; or if he claimed a balance of account, he should have sworn, that he verily believed the balance in his favour to be so much. Tidd. Prac. 21. 2 Vez. 489. 3 Atk. 501. Thirdly; the bill has no equity for this Court; for if a balance is due the plaintiff, he may have a remedy at Common Law.

By the Court. The affidavit is clearly defective. The plaintiff should swear positively to a debt, or to his belief, that a certain balance of account was due.

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The plaintiff being in Court, and making this affidavit, the Court awarded a new writ; it appearing upon the examination of the plaintiff, who was sworn at the instance of the defendant, that the particular account on which this suit was brought, though laid before the arbitrators, had not been acted upon in any manner.

Levy, for defendant.

Rawle, for plaintiff.

DE TASTETT & Co. vs. CROUSILLAT.

A merchant, who is in the habit of insuring for his correspondent, and is ordered to make insurance, which he neglects, or imperfectly executes; is answerable as if he was himself the assurer, and is entitled to the premium.

When the insurance has been imperfectly made, and not altogether neglected, it may be questioned, whether the agent is liable for more than the damages, equal to the chance of the indemnity which would have been afforded by the exact execution of the order.

A claim of damages against an agent, upon the orders of the principal, which he is charged with neglecting, is not entitled to favour, if the order has been couched in doubtful terms.

If a reasonable diligence was used by the agent to effect the insurance, he is not liable.

The neglect of the agent to give his principal notice of his having been unable to execute the order for insurance, will make him liable in damages. Unliquidated damages cannot be set off.

An agreement to accept bills, renders it unnecessary that the drawee shall have funds in his hands belonging to the drawer.

Parol evidence to show facts stated in certain letters received by the witness, will not be admitted; as the letters are higher testimony, and should be produced.

THE jury were empannelled to try issues in two actions, the one brought to recover the amount of a bill of exchange, drawn by the defendant on a house at Rochelle, in favour of the plaintiffs, for two thousand pounds sterling, and damages, the same having been protested; and the other for the balance of a commercial account. The plaintiffs are merchants residing at London, between whom and the defendant very considerable transactions had taken place, principally in the drawing of bills on each other, and insurances effected in England, on vessels and cargoes, sent by the defendant to England, and to different

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parts of the continent. Many of the defendant's bills, drawn in the summer and autumn of 1805, on the plaintiffs, were protested; and the defendant having been obliged to pay the damages, to the amount of about two thousand pounds, this is claimed by the defendant as an offset, the plaintiff consenting that the claim may be made in this action. He also claimed the sum of seven thousand pounds of the plaintiff, for not having effected an insurance on the Betsey, as he had been directed to do, and as he had been in the habit of doing on former occasions. This cause was partly tried at a former term, when it was objected by the plaintiffs' counsel, that this claim, if well founded, could not be made an offset. But the Court deciding otherwise, a juror was withdrawn, that the plaintiff might have an opportunity of taking testimony to meet this point. Depositions having been taken, the question relative to this point appeared to be as follows. In consequence of a decision in the case of *Relluer vs. Le Messurier*, in 1803, 4 East's Reports, 396, declaring that policies made in England upon foreign vessels, seized as prize by any of His Majesty's privateers, and condemned, were absolutely void; it had become a practice, in many instances, for the underwriters in London to execute a policy in common form, and to give a separate engagement, which they considered binding on their honour, to pay the losses in cases of captures and condemnations, whether by English cruisers or others. In the summer of 1805, the plaintiffs having been ordered by the defendants to obtain an insurance on a vessel named the Tryphenia, had it effected with this separate engagement, of which he informed the defendant on the 16th of October. In the summer of the same year, the defendant wrote to the plaintiffs, informing them of his intended shipment of a cargo of colonial produce to Antwerp, by the ship Betsey; and desiring him to insure six thousand pounds on the cargo, which he desires may be done "*by the most solid assurance.*" He shortly after directed him to insure one thousand pounds more on the same cargo. The plaintiffs had the

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insurance effected in the common manner, but no separate engagement to insure against capture was obtained; and it appears, by a deposition in the cause, that the broker who was applied to, to get the insurance effected, was instructed by the plaintiff to obtain, if he could, such a separate engagement. The attempt was made at Lloyd's Coffee-House, but none of the underwriters could be prevailed upon to enter into such an engagement.

On the 16th of October, the plaintiffs enclosed to the defendants three separate accounts for the insurances effected upon the Tryphenia, the six thousand, and the one thousand pounds on the Betsey's cargo. In the first, they stated, specially, the separate agreement which had been obtained; but made no mention of it, as to the other insurances. No other notice was given to the defendants, that in the latter case such an agreement had not been obtained. The Betsey was captured about the middle of November, by a British cruiser, and condemned as good prize.

On the 3d of July 1805, the plaintiffs wrote to the defendants, referring to a former letter from the defendants, in which he stated the details of his concern with Anthony De Tastett & Co., of St. Sebastians, which, they say, "we are to support with all our credit. We have written them on this subject, and said that we would honour all your drafts on us, for your account."

On the 27th of August, the plaintiffs wrote to the defendant, that they would accept no more of his bills. In many letters from the defendant to the plaintiffs, previous to the letter of the 27th of August, when he mentioned the bills drawn on the plaintiffs, he distinguished between those drawn on account of his connexions with the house at St. Sebastians, which he directed to be charged to them; and those drawn on his own account, which he ordered to be placed to his particular debit.

De Tastett & Co. w. Croustillat.

The defendant's counsel offered a witness to prove, that, by the letters of his, the witness's correspondents in England, they had, in the summer and fall of 1805, effected insurances on his property, with a separate engagement to pay, though the property should be seized by the British cruisers, and condemned. This was objected to, and the Court sustained the objection; observing that the evidence was of no higher dignity than hearsay.

Duponceau and Levy, for the defendants, contended, first; that the plaintiffs were bound to have the insurance effected upon the cargo of the Betsey, with a separate engagement, as had been done on the Tryphenia; or should have shown, satisfactorily, that they could not get this done. Proof that one broker had made an unsuccessful attempt, is no evidence that others might not have succeeded, if they had been applied to. Second; that even if every proper attempt had been made by the plaintiffs, and had failed, still the plaintiffs should immediately have given the defendant notice thereof, to enable him to cover his property fully in this country. Third; that the plaintiffs, having engaged to honour the defendant's bills, they were bound to do so; and are liable to pay all the damages arising from their failure.

Rawle, for plaintiff, on the first point, answered, that no order to insure in the way now contended for, was given; and the plaintiffs endeavoured, as far as they were bound, to obtain such an insurance, but could not do it; consequently they are not liable. Second; the accounts enclosed in the letter of the 16th of October, in one of which mention is made of this separate and special underwriting, and in the other cases no notice is taken of such an agreement, were sufficient to apprize the defendant of the real situation of the cargo of the Betsey, as to the indemnity secured on it. Third; that the undertaking, as the plaintiffs, to accept the defendant's bills, went only to such as were drawn in relation to his concern with the house at St. Sebastian's; that, at any rate, the demand cannot be supported,

De Tastett & Co. vs. Crouillat.

unless the defendant had shown that he had sufficient funds in his hands of that house, to authorize him to draw; and at all events, the plaintiffs were not bound to accept any bills drawn after the 27th of August, when they informed him that they would accept no more of his bills.

WASHINGTON, Justice, delivered the opinion of the Court. The first question arises upon the defendant's claim of seven thousand pounds. The law is clear, that if a foreign merchant, who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable, not for damages merely, but, as if he were himself the underwriter, and he is of course entitled to the premium. In this case an insurance was effected, valid so far as it went, and had it gone as far as the defendant contends it ought, it would, by the legal decisions in England, have been inoperative and void. But the defendant says, that this ought not to have entered into the consideration of the plaintiffs; that, having ordered such an insurance to be made, it was the duty of the plaintiffs to make it, and to secure to the defendant the chance of an indemnity, though founded only on the honour of the underwriters. To this charge of misconduct, the plaintiff has given two answers: first, that he received no orders to effect the insurance, in the manner now contended for; and, secondly, that he made the attempt to do it, and could not get it effected. The words "solid assurance," contained in the defendant's letters, are certainly equivocal. They might mean such an insurance, as would completely protect the property against captures by British cruisers, the imminent dangers of which were foreseen by the defendant, and acknowledged and dreaded by the plaintiffs, as their letters evince; or they might mean, that the underwriters should be men of solidity, and able to pay in case of loss. It may be proper here to observe, that a claim for damages against an agent, comes with a bad grace

from a principal, who complains of a disobedience of order couched in ambiguous terms. If, with a reasonable attention to the language, the words would bear the construction which has been placed upon them, it would be too much to condemn him in damages, because, upon a refined and critical examination of them, a different construction should be deemed the correct one.

The second excuse depends upon the fact, whether a reasonable diligence was used by the plaintiffs to effect an insurance as ordered. If it was, they would not be answerable for the want of success which attended those endeavours, even if it were perfectly clear, that the general principle contended for applies to a case of this kind; as to which we give no opinion.

The next question respects the claim for damages on protested bills of exchange, which, it is contended, the plaintiffs, by their letter of the 3d of July, undertook to accept. By the Court, it appears that that promise was confined to bills drawn on account of transactions which were to take place between the defendant, and De Tastett of St. Sebastians; and this is strongly confirmed by the subsequent letters of the defendant to the plaintiffs; in which he discriminates between those bills which are to be charged to the house at St. Sebastians, and those drawn on his particular account. If so, the defendant is entitled to damages upon those bills only, which are of the former description. But the Court do not acquiesce in the positions laid down by Mr. Rawle under this head. First, clearly, the plaintiffs were bound to accept all bills drawn in the faith of the letter of the 3d of July, between the date of the plaintiffs' letter to the defendant, forbidding any further drawing and the receipt of that letter by the defendant; until which time, it could not be considered as changing the relative situation of the parties. And secondly; it is of no consequence whether the defendant had or had not funds in the hands of the house at St. Sebastians, unless this had been made a condition of

De Tastett & Co. vs. Crousillat.

plaintiffs' engagement to accept; for a man may validly bind himself to accept bills without funds, and if the promise be general, and the transactions fair, he continues bound until a countermand is received.

Verdict for the plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1808.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the
Supreme Court.
Hon. RICHARD PETERS, District Judge.

LESSEE OF JAMES vs. STOOKEY.

Ejectment.—Although the recitals in a warrant, to another than a party to the suit, may not be evidence of the fact stated in them, yet when they are corroborated by circumstances, such as the antiquity of marks on the ground, and by the correspondence between the marked lines and those stated in the warrant, the jury may consider the recital, that a previous warrant for the land had issued, as true; the papers of the Surveyor General, to whom the original warrant may have been returned, having been destroyed by fire.

THE lessor of the plaintiff claimed under a warrant, dated the 10th of July 1762, to William Hockley, which recited that a warrant had issued for the same land, to the same person, in 1755, which had been surveyed, but that the survey had not been returned. The warrant is for five hundred acres, lying above Snake Spring, adjoining Thomas Croyle. The title is regularly deduced from Hockley to the plaintiff, for one-half of the land. The warrant was surveyed in 1767, by Jacobs, under a special order from the Surveyor General. This survey, which was objected to and disallowed by the Court on the former trial,

Lessee of James vs. Stookley.

was now admitted; the whole proceedings, upon the caveat of the plaintiff and Smith, against the assignee of Dougherty, being now produced; in which case, judgment was given for the caveator, and a patent ordered to issue for the land in question.

From the blocking of the trees, found in the lines of this tract by the surveyor, who surveyed it under the order of this Court, there was strong evidence, that this tract had been surveyed previous to the year 1760; and the location of it then, as laid down by the survey in this cause, was proved by very strong evidence. A survey made for George Croghan, of an adjoining tract of land, in 1755, and patented in 1763, calls for a line of this tract, as Hockley's land, by course and distance.

A recovery, in ejectment, by Robert Elliott against Devenbaugh, in 1793, was also offered as additional proof of the boundaries of the land; which evidence was admitted by the Court, in the light, and in the degree of hearsay evidence, as stated on the former trial. Evidence was also given, that the Surveyor General's house had been burned, before 1762.

The defendant claimed under a warrant dated the 7th of July, 1762, surveyed in 1766: but the location of the land did not appear to the Court to interfere with the tract, as claimed by the lessor of the plaintiff.

WASHINGTON, Justice, in charge, informed the jury; that the recital, in the warrant of 1762, to Hockley, was, as between these parties, no evidence that a warrant had issued, and been surveyed in 1755; yet, taken in connexion with the antiquity of the marks on the line and corner trees; and the call made by course and distance, of one of the lines of this tract, as Hockley's land, in Croghan's survey, made in 1755; the jury might consider the existence of Hockley's warrant in 1755, as proved; particularly, as the burning of the Surveyor General's house accounts for the non-production of the papers, and for the issuing of the second warrant, on the 10th of July 1762.

Lessee of James vs. Stookey.

Should this be the opinion of the jury, then they ought to find for the plaintiff; since the defendant does not set up a title which commences earlier than the 7th of July 1762.

Should the jury not feel themselves warranted in considering the plaintiff's title to have commenced before the 10th of July 1762, which is three days later than that set up by the defendant; they will then inquire whether the location of the tract under the warrant of the 7th of July, interferes or not with that of Hockley's warrant. To the Court, it appears that the survey did not interfere; and if this should be the opinion of the jury, their verdict will, on this ground, be for the lessor of the plaintiff, for an undivided moiety of the land in the declaration mentioned.

Verdict for plaintiff for a moiety.

BARKER vs. PARKENHORN.

B. pledged a vessel to P. to secure a sum of money loaned, and she was afterwards attached by another creditor of B. in the state of Delaware, and there sold under legal proceedings, P. becoming the purchaser; and after repairing her at some cost, he brought her to Philadelphia, where the plaintiff instituted this action of trover, for her recovery.

Held, that the regularity of the proceedings in Delaware, under which the vessel was sold, cannot be inquired into in this issue.

The tender made by P. of the amount of the debt and interest, for which the vessel was pledged, without also tendering the expenses of her repairs, was not sufficient.

If, when a party is about to tender a sum of money, the person to whom it is intended to pay it, declares he will not receive it, it is not necessary that the money should be actually produced.

THIS was an action of trover and conversion, to recover the value of a vessel, pledged by plaintiff with defendant, to secure a sum of money loaned. The vessel, after the pledge, and whilst lying in the state of Delaware, where she was at the time she was pledged, was sold under a judgment rendered by a magistrate of that state, upon an attachment of a Mr. Long against the plaintiff, and was purchased by the defendant. He found it necessary, before he could remove her, to lay out a sum of money in her repairs, after which he brought her to Philadelphia. Some time after the money was due to the defendant, the plaintiff came to Philadelphia and demanded his vessel, offering to pay the principal debt and interest due. The defendant insisted upon being paid the money he had expended on her repairs, and some other necessary sums laid out for her. The plaintiff, after some hesitation, said he would pay any legal demand, and called upon the defendant to produce his account, with the bills of what he had laid out. This the

Barker vs. Parkenhorn.

defendant refused to do, and left the house, saying he would have none of his money. A tender was made of the debt, but no money was produced by the plaintiff, for the advances of the defendant for the vessel. After this, and before the suit was brought, the plaintiff wrote to the defendant, that he had received his account, and found it extravagant, and requested a meeting on the subject. The meeting either did not take place on that day, or they met and could not agree; but no subsequent tender was made by the plaintiff. The suit was brought, after which the defendant sold the vessel. There was sufficient evidence in the cause to show, that the defendant purchased the vessel for whoever might be entitled to her, and considered himself trustee for the plaintiff.

Levy, for plaintiff, cited Cro. Ja. 245, to show that after a tender of the money due, trover will lie against pawnee. He contended that defendant is to be considered as a trustee for plaintiff, if the sale in Delaware was regular; but he insisted that the Justice did not proceed regularly.

Washington, Justice. Do you admit that he had jurisdiction of the case?

Levy answered that he had some doubts, but could not prove that he had not jurisdiction.

By the Court. Then you cannot, in a collateral action, object to its regularity, whilst it remains in full force.

Levy, to prove that the defendant was to be considered as a trustee, read 3 Vez. jun. 245. In case of a pledge, if no time be fixed for redemption, pawnee cannot sell, but must obtain judgment, and levy execution on the property pledged. Plaintiff has all his life to redeem. Cro. Ja. 244. 5 Rob. Adm. Rep. 232: He contended, that a pawnee cannot lay out money on the pledge, so as to charge pawnor with it.

Hallowell, for defendant, admitted his client to be a trustee; but contended that plaintiff could not reclaim the property, without paying the advances made for the use of the property,

Backer vs. Parkenbort.

as well as the original debt; and that a legal tender was not made in this case.

WASHINGTON, Justice. The most favourable light in which this case can be considered for the plaintiff, is, that the defendant, by the purchase under the execution, became a trustee for the plaintiff; and it is clear, that the plaintiff could not reclaim his property, without paying or tendering, as well all necessary and proper sums advanced by defendant, on account of the trust property, as the original debt and interest. The question then is, did he tender all that was due? He did not, on the first meeting, make a legal tender of any thing but the debt and interest, for the money was not produced.

But the defendant, by refusing to produce his account of the advances, and declaring that he would not receive the money, dispensed with the necessity of a regular tender; and of course, if the cause rested here, it would be proper to view the case, as if a regular tender of all that was due had been made. But, at another day, and before suit brought, it seems that the defendant did furnish the plaintiff with his account, to which the plaintiff contented himself with objecting that it was extravagant, without objecting to opening the transactions of the former day again, and without making a new tender of what was really due, or what he thought to be so. Had he objected, on account of the former tender and refusal, we will not say what would have been the legal effect of it. But he made no such objection; and by his conduct opened the former transaction, and merely questioned the accuracy of the account. Under these circumstances, he ought again to have tendered at his peril, as much as the defendant was justly entitled to receive; and not having done this, he cannot recover in this action. Whatever is justly due to the plaintiff, he may recover in another form of action.

The plaintiff suffered a nonsuit.

Hurry vs. The Assignees of Hurry.

NICHOLAS HURRY vs. THE ASSIGNEES OF SAMUEL HURRY AND
G. W. LAWRENCEWILLER, BANKRUPTS.

Where a bond has been given in the nature of a bottomry, but the circumstances under which it was executed were not such as to warrant the captain in executing a maritime hypothecation, yet, the captain having had a power of attorney from the owner of the vessel, to borrow money upon the vessel, such a contract, if made by the captain, may create a lien on the vessel, in a Court of Common Law.

The master of a vessel has no power to enter into a charter party in a foreign port, for the purpose of giving the creditor of the owner of the vessel a security for the debt due to him.

Where the owners of a vessel have no agent in a foreign port, the master has the power to make a charter party.

ACTION for money had and received. The parties entered into the following agreement, which is filed. "The defendants admit the receipt of the proceeds of the John and Alice, and of the freights of said vessel, under charter party; but these admissions to have no other effect, than to entitle the parties to bring forward, in this form of action, the following questions: First, whether the plaintiff is entitled to the whole, or to any, and what part of the proceeds of the sale of said ship; and, second, whether he is entitled to the whole, or to any, and what part, of the freight arising under the charter party?" The plaintiffs, having failed in the libel which they filed against the John and Alice, in order to subject her to the bottomry bond executed by Whitesides; brought this action to recover the balance of the proceeds of the said ship, which was sold to pay sailors' wages; and the balance, together with the freight earned by her on her last voyage from Liverpool to Philadelphia; which were paid into the hands of the clerk of this Court, to await the event of this cause."

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Hurry vs. The Assignees of Hurry.

of attorney : first, because it is executed in his own name, and not in the name of his constituent, reciting his authority. Abbot, 441. 3 Lev. 140. Second ; because if properly executed, the power did not authorize him to take up money, except on bottomry, and of course he could not borrow, except in a case where a good maritime bottomry bond could be given ; which this Court has decided could not have been given in this case : particularly, he could not give such a bond for securing previous advances, as was done in this case. Third ; the power was executed when the first loan was made, and was then *functus officio*. They contended, that the captain had no power to charter the vessel. Abbot, 146. 86. Of course, the plaintiff had no right to any part of the freight ; but, at all events, he had no right to more than what was received over the five hundred pounds, which he was bound to pay, by the charter party. Upon the merits of the case, they produced an account furnished by the plaintiff, in which all the advances for the John and Alice, for which the bottomry bond was taken, are charged, and then carried to the general account of Samuel Hurry ; against whom the balance is brought down to twenty-one pounds some shillings, and this is carried to the account of Hurry and Lawerswiller.

WASHINGTON, Justice, charged the jury. It has been truly stated by the defendants' counsel, and admitted by those of the plaintiff, that the advances made by the plaintiff were not such, nor were they made under such circumstances, as authorized the master to execute a bottomry bond for securing their payment. The only ground upon which it can be supported, is the power of attorney, provided it authorized the acts of the master in this case ; if it did, though not good, as a maritime bottomry bond, it may create a lien on the vessel. By this power, the master was authorized to borrow any sum or sums of money, and to secure their payment by bottomry or hypothecation bonds on the vessel and freight, or in any other way. This

Hurry &c. The Assignees of Hurry.

power, certainly, does not confine the authority to cases where a maritime hypothecation only could be given. First, because the words are general as to the power of borrowing, and the nature of the security to be given; and secondly, because if such had been the meaning, the power was unnecessary, since the master possessed it under his general authority of master. But, at the same time, the account stating the items of the sum lent must be examined, and no sums can be allowed, but what are to be considered, strictly as money lent and advanced by the plaintiff, either by delivering them to the captain, or laid out by the plaintiff for the use of the vessel, as to which there is no difference. As an instance of the sums not to be allowed, are such as the plaintiff, as agent or consignee of Hurry and Lawerswiller, or of the ship owners, had paid for premiums of insurance on the vessel and cargo, commissions charged, and the like. Nor is it of any consequence, whether these loans or disbursements were made on the first, second, or third voyage; because, though there is a maritime hypothecation, the bottomry bond would not be good, merely to secure antecedent advances; yet, the power in this case, being general, and unlimited as to time, and having never been revoked, it was competent to the master to give security on his last voyage, for loans made then, and on former voyages, under the power. It is true, that the bottomry bond, not having been executed in the name of Hurry, could not be a foundation on which a suit could be maintained against him. But this action is brought for the sums lent; and the hypothecation bond is evidence, that a security on the vessel was given for such loans, so as to give to the plaintiff a lien on the vessel, or her proceeds.

As to the freight, it has been said by the plaintiffs' counsel in argument, that the charter party was given by the captain, to secure so much of the debt due from Hurry and Lawerswiller; but no evidence of this has been given. If there had been, only the captain's part could be bound, because he certainly had no authority, merely as master, or under the power

Hurry vs. The Assignees of Hurry.

of attorney, to enter into such an engagement. But under his general authority, he had a right to charter the vessel, the owners having no agent at Liverpool. The consequence of that is, that the defendants are entitled to receive five hundred pounds sterling, of the money earned by the vessel, and in the hands of the defendants' agent; and the plaintiff, on this account, is only entitled to the residue of the freight.

As to the question, whether the disbursements for which the bottomry bond has been given, have been discharged by the admissions of the plaintiff, in the accounts he has furnished, you are or will be the proper judges, after you have examined the accounts. If these sums are charged in that account, and credited to the amount of the debit, this would certainly be a discharge.

The jury found for the plaintiff, only the difference between the five hundred pounds freight, and the amount actually made by the vessel; and nothing on account of the bottomry bond.

SCULL vs. BRIDLE.

In cases of extreme necessity, the master may, in a foreign country, sell the vessel and tackle to prevent the property from perishing; but he cannot do this in the country where the owner lives.

A sale of the vessel and her tackle in Maryland, at auction, by the master, who, by misconduct, had got the vessel on shore, gives no title to the purchaser; and in an action of trover and conversion, for the articles purchased, the measure of damages is the real value of the property, and not what they were sold for.

THIS was an action of trover and conversion, brought for certain sails, rigging, masts, &c., which had belonged to a vessel of the plaintiff, wrecked on the coast of Maryland; and being got on shore, the vessel and tackle were sold at public sale, by the captain, upon notice, and were purchased by the defendant. The plaintiff had hired the vessel to the captain for seventy-five dollars a month, for as long a time as both parties should please. The captain took a freight to Virginia, and on his return, by his misconduct, got her on shore; and having removed all these articles and others to the shore, sold them as above. There was some contradiction in the evidence, as to their safety, in the place to which the captain had removed them.

The defence was, that the captain had a legal power to sell; for which were cited, 1 Rob. Rep. 70, 71. 127. 3 Idem, 208. 210. 217. Douglass, 219. It was held, that the defendant was liable, only, for what the property sold for.

WASHINGTON, Justice, charged the jury. In cases of extreme necessity, the master may sell in a foreign country, rather than let the property perish; but not in the country

Scully vs. Bridgman

where his owner lives; and no case of the sort can, it is believed, be shown. Mischievous would be the consequence, if such doctrines were tolerated. In this case, there was, in fact, no necessity for the sale; for the captain might have got these articles into a place of safety, and ought to have done so; and informed his owner, or rather the owner of the vessel, of her situation; he, the owner, living in Philadelphia. But what makes this case stronger, is, that the master was not the servant of the plaintiff, but the hirer of the vessel; and of course not even an implied authority can be presumed, to warrant the exercise of so extraordinary a step, as selling this property. As to the damages, the real value of the property, and not what the defendant gave, must be the measure of the damages.

Verdict for the plaintiff.

Watson et al. vs. The Insurance Company of North America.

WATSON & HUDSON vs. THE INSURANCE COMPANY OF NORTH AMERICA.

The report of a survey, made upon an examination of a vessel for the purpose of ascertaining her situation after a disaster in a foreign port, is not evidence of the facts stated in it; but only that such survey was made.

The condemnation of a vessel, upon a report of the surveyors, that many of her timbers were unsound and rotten, and that in her strained and shattered condition, and from the want of proper docks at the place for repairing her, her repairs would cost more than she was worth; is not a condemnation, which will excuse the underwriters from liability under the clause in the policy, which declares, that if the vessel should be condemned, as unsound or rotten, the underwriters should not be liable.

ACTION on two policies, one on the *Anna Maria*, at and from Cadiz to Antwerp, valued at 12,000 dollars; and the other on the freight of said vessel, on the same voyage, valued at 6,000 dollars. Shortly after leaving Cadiz, the vessel met with many gales, which caused her to strain, and make much water; and after consulting the officers, and with the advice of the ship-carpenter, she put back, and got to Gibraltar, where, still experiencing bad weather, she stranded. The captain petitioned the Admiralty Court at Gibraltar for a survey, which was had; and the report was, that upon examination, many of her timbers, which are particularly mentioned, were found to be unsound and rotten; and that in the shattered and strained situation of the vessel, and the want of proper docks there for repairing her, the repairs would cost more than the vessel was worth; and therefore they recommended that she should be sold. On this report, the captain petitioned the Court, that a sale should be ordered for the reasons mentioned in the report. The order was accordingly given, and the vessel was sold.

Watson et al. vs. The Insurance Company of North America.

The question of fact, turned upon the seaworthiness of the vessel, when the risk commenced; and testimony was given, with a view to prove that she was strong, staunch, and sound, when she sailed from New-York for Cadiz. Upon this point, the question was, whether the report of the surveyor was evidence of the facts contained in it, or only evidence that a survey was made, and an order of sale awarded; and to prove that the report is evidence of the facts stated in it, Rawle, for plaintiff, read Park, 406.

By the Court. The report is not evidence of the facts stated in it; but only that a survey took place.

The point of law raised, by Ingersoll and Hopkinson, for defendants, was, that under that clause in the policy, which declares, that if the vessel should be condemned as unsound, or rotten, the underwriters should not be liable, this condemnation was conclusive upon the parties; and on this ground, they moved for a nonsuit.

Rawle, for plaintiff, relied upon the case of *Wilson vs. The Marine Insurance Company of Alexandria*, 3 Cranch, 187; and the unreasonableness of the construction contended for by the defendants' counsel.

WASHINGTON, Justice, delivered the opinion of the Court. We can only understand the meaning of contracts, by the language which the parties have used; and that must govern the construction, unless decisions have been made, by which a fixed meaning has been given to these expressions. In this case, no adjudication, to our knowledge, has ever been given on this clause. The case from 3 Cranch, is altogether unlike it; for although the same clause was resorted to in the policy in that case, still no opinion was given as to its construction. The plea was, that the vessel was not seaworthy at the time the risk commenced; and the defendants offered the report of the surveyors, which did not declare the vessel to be unsound or rotten, as evidence that she was not seaworthy when she sailed.

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Assignees of Field vs. Moulson.

dence that all the articles enumerated in it, were received by the consignee; and if the consignee has rendered no accounts of sale, particularly after so many years, and at the trial offers no evidence to prove what part was sold, and at what prices; every presumption is against him, that he sold them at the invoice prices. But in this case, as the bankrupt stated in the letter which covered the invoice, that they would not probably sell for so much, the jury will say what damages the plaintiff is entitled to receive.

Verdict for 447 dollars and 13 cents.

Sergeant, for plaintiff.

Shoemaker, for defendant.

Webster vs. Massey.

WEBSTER vs. MASSEY.

The defendant had been discharged by the insolvent laws of Pennsylvania, of 1790 and 1798. The Court refused to enter an *exoneretur* on the bail-bond upon this ground.

The laws of a foreign country, where a contract is made, will be regarded by foreign tribunals as to the obligations of the contract, and as to its discharge.

A discharge of the person under a foreign insolvent law, leaves the contract still in force; and whether bail shall be demanded or not, must depend on the laws of the country where the suit is brought.

RULE to show cause why an *exoneretur* should not be entered on the bail-bond, the defendant having been discharged under the insolvent laws of Pennsylvania, passed in 1790 and 1798. This law only discharges the person from imprisonment or arrest, in any of the cases of creditors, returned as such by the debtor.

MSHane, in favour of the rule, read the following cases: 2 Stra. 733. 1 Atk. 255. Cook's Bankt. Law, 347. 1 East, 6. 3 Vez. jun. 447. 1 Dall. 229.

Hopkinson, against the rule, insisted that the defendant could not be discharged by a state Court, because the plaintiff was not returned as a creditor. Secondly; that the cases cited, apply only to the discharges under the bankrupt laws of a foreign country, and not to mere discharges of the person.

By the Court. The difference between a discharge from the contract itself by a foreign judgment, and a mere discharge of the person, is an obvious one. The laws of a foreign country, where the contract is made, will be regarded by the tribunals of another country; and so will the same laws which discharge

Webster vs. Massey.

the debtor from the obligations of his contract. In *Camfranke vs. Bunell*, this Court decided, that the defendant should not be held to bail, because the French *arret* was incorporated with, and governed the contract. But as to the mere forms of proceedings, the laws of the country, to whose tribunals the appeal is made, must govern. A discharge from the contract, therefore, by a foreign law or judgment, is conclusive everywhere, upon that contract. But a discharge of the person only, under a foreign insolvent law, leaves the contract still in force; and whether bail should in such cases be demanded or not, must depend upon the laws of the country, where the suit is brought. The other objection, taken by the plaintiff's counsel, appears to have considerable weight in it. Upon the whole, we are of opinion, in this case, that the defendant ought not to be discharged without common bail.

Rule discharged.

The United States vs. Little.

THE UNITED STATES vs. LITTLE.

The Court continued the cause, on the application of the defendant, a witness being absent in New-Jersey; on the ground, that a state magistrate cannot issue process, for defendant's witnesses, into another state.

INDICTMENT for a misdemeanour. The defendant was bound over by a state magistrate, and the recognizance, being returned into Court, a bill was found this term. The defendant moved for a continuance, on the ground that his material witness left Philadelphia, before he was bound over, and went to New-Jersey; and that, notwithstanding all his inquiries, he has not been able to hear of, or find him. The question was, whether the defendant had not been negligent, in not obtaining compulsory process, for the witness, from the magistrate who took the recognizance.

Hopkinson, for the defendant, contended that the magistrate who binds over, cannot issue process for the defendant's witnesses; but still less can he bind over the defendant's witnesses to appear at Court. But, even if a Judge of this Court could have done this, which he denied, and stated this to be the practice of the state; still it is clear, that a state Judge could not send process into Jersey. The defendant could not get process from the clerk of this Court, until the bill is filed; or at any rate, until the recognizance is returned to it.

Dallas, contra. The right of the defendant to compulsory process, is under the constitution; and if he cannot procure it from the examining magistrate, he may entirely lose the benefit of his testimony. He stated the practice differently from Mr. Hopkinson.

By the Court. The objections to a state magistrate issuing process into New-Jersey, are conclusive.

The cause was continued.

Lessee of Vanhorn vs. Chesnut.

LESSEE OF VANHORN vs. CHESNUT.

An ejectment cannot be maintained on a warrant, without a survey, or purchase money paid.

EJECTMENT. The title of the lessor of the plaintiff was founded upon an application of John Irvin, for the land in question, to include his improvement, made in 1776. In 1774, this land, as appeared by an abstract from the execution book of the prothonotary's office of the county, in which the land lay, was levied upon by a writ of *fiert factas*, sold by the sheriff under a *venditioni exponas*, and purchased by a person under whom the defendant claimed. The only question of fact in the cause was, whether the *fiert facias* was levied on this land, or on another tract belonging to the same person. Irvin never had a survey made of the land, nor had he paid any part of the purchase money to the state; but on the contrary, the purchaser under the execution, to secure his title, was obliged to pay it.

A motion for a nonsuit being made, on the ground that the plaintiff had not acquired a legal title, the Court nonsuited the plaintiff, for the reason assigned.

Dallas, for plaintiff.

Ingersoll, for defendant.

The United States vs. Wells.

THE UNITED STATES vs. WELLS.

Set-off.—When the claim which is asserted as a set-off, depends for its validity on the generosity of the government, it cannot be enforced by this Court, against a legal demand upon the defendant by the United States. Damages which have not been ascertained, and are uncertain in their nature, cannot be made a matter of set-off.

THIS action was brought to recover a balance due from the defendant, as a collector of the excise duties. The defendant was an active officer, in resisting the opposers of the excise law, in the western counties of Pennsylvania, and in consequence of his activity, had his house burnt by the insurgents, and suffered other injuries to his property. By an Act of Congress, passed in 1795, upwards of eight thousand dollars was placed at the disposal of the President, to aid such of the officers of government, and citizens, who had suffered losses in their property, by the insurgents, as in his opinion stood in need of immediate assistance. The President appointed commissioners to view and value these losses, who reported that the defendant, amongst others, had suffered to the amount of ——— dollars. The defendant received seven or eight hundred dollars, much less than the sum mentioned in the report. The subject of full compensation was afterwards brought before Congress, and a favourable report made by the Secretary of the Treasury, to whom the subject was referred, which was rejected by the Committee of Claims. The defendant claims the difference between the estimated value of his losses, and the sum received, to be considered, by the Court and jury, as so much paid by him to the United States, in part of what is now demanded of him; and of course to be credited to him in this

The United States vs. Wells.

action. The defendant informed against delinquents, under the excise law, and prosecutions were instituted against the defaulters by the government; but as connected with the general amnesty, granted to these people after the insurrection was quelled, the prosecutions were discontinued by order of the government. The informer being entitled to one half of the penalty on conviction, the defendant claims a credit for his half of all the penalties, in the cases where he was an informer; upon the ground that the government could not, by the act of its officers, deprive him of the rights which had once vested in him to these penalties. This was the second point in the cause.

WASHINGTON, Justice, delivered the opinion of the Court. Neither of these claims, on the part of the defendant, can be supported. The first is made upon the generosity of the government, which might be very proper if presented to the legislative branch of the government, in its real character of an imperfect obligation. But the attempt to enforce it, in a court of justice, cannot possibly succeed. It could not be countenanced, even against an individual; let the defendant's counsel call it by what name they please, it is nothing more or less, than to offset a claim of damages sustained by a public officer, against the government. An appeal has been made to the liberality, and we think the justice, of the proper department, which did not succeed. It is impossible for us to assist the defendant.

The claim of the penalties is quite as unfounded. It is immaterial whether the United States, by discontinuing the prosecutions, could legally defeat the defendant of his half of the penalties, or not. If they could not, then the defendant was not injured by this act of the government. He might still have proceeded for his part; if he could, then, had the act been that of an individual, (the most favourable point in which to view the case for the defendant,) his claim would be for damages

The United States vs. Wells.

sustained; which might be more or less, according to circumstances; such as his ability to have supported the prosecutions, and that of the person prosecuted, to pay in cases of conviction. But the damages, being unliquidated, could not be effect.

The parties then agreed to withdraw a juror, and to refer the claims of the defendant to the officers of the Treasury Department.

Dallas, for plaintiff; Morgan and Ingersoll, for defendant.

Hourquibee vs. Gerard's Administrator.

HOUREQUIBEE vs. GERARD'S ADMINISTRATOR.

The Court continued the cause, upon the application of the defendant, he being an administrator, and having a few days before discovered among the intestate's papers, material testimony.

MOTION by defendant, to continue the cause: first, because it appears, by a commission returned in the cause, that the plaintiff had dispensed with an answer being made to one of his own interrogatories, which the defendant alleged was very material to his defence. The case of *Ketland vs. Bisset*, and *Winthrop vs. The Union Insurance Company*, were cited to prove, that if all the interrogatories are not answered, it is fatal to the whole commission.

In answer to this it was said, that the defendant should not rely on the plaintiff's depositions, and therefore the objection could not bear upon the motion to continue. But further, that this commission had been returned for twelve months, and that the cause had been continued at the last term, on the motion of the defendant, for another reason, but this was not mentioned.

The second ground for a continuance was, that the defendant had, within a few days past, looked at a letter of his testator, in his possession, by which it appeared, that the sentence of a foreign Court of Admiralty would be important and essential to his defence.

The Court agreed to the continuance, for the second ground assigned, particularly, considering the defendant as an administrator.

Hylton vs. Brown.

HYLTON vs. BROWN.

Action for mesne profits. The plaintiff can recover mesne profits, in the nature of damages, only from the time of the ouster laid in the declaration, having proved no title prior thereto.

The value of the improvements made by the defendant, ought to be first set against the mesne profits prior to the actual ouster, and after the title of the plaintiff accrued; and the balance, only, can be properly deducted from the rents and profits to which the plaintiff is entitled.

ACTION to recover *mesne profits*, from the time of the ouster, laid in the declaration, to the time when possession was delivered under the *habere facias possessionem*, in 1806.

The defendant gave evidence of improvements made on the land by the defendant, prior to the time of the demise laid, and of others subsequent to that period.

Proof was given by the plaintiff of the value of the rents.

The defendant held the possession some years anterior to the date of the demise.

Lewis, for plaintiff, read 3 Wells, 118.

WASHINGTON, Justice, charged the jury. This is a claim for mesne profits in the nature of damages, the value of which you are to estimate. Against this demand, the value of the improvements when the plaintiff received possession, is a fair offset. But the plaintiff, having proved no title, except under the recovery in ejectment, can recover damages only from the time of the demise laid in the declaration of ejectment. The value of the improvements ought first to be set against the mesne profits received by the defendant, prior to that

Hyken vs. Brown.

period, and after the plaintiff's title accrued; and the balance only, if any, may properly be deducted from the rents and profits to which the plaintiff was entitled subsequent to the demise.

Verdict for upwards of 2000 dollars.

Ex vs. The Administratrix of Shaw.

ADMINISTRATRIX OF SHAW.

to the period when a
be first applied; and if it
be applied to diminish the
discharge the interest, the principal
to it the balance of interest which may
interest upon interest.

ated an account upon a principle unfavourable to
charge of interest, he ought to be bound by it.

ference as to the application of the general rule, relative to
ing interest, to debts legally carrying interest, and to those where
rest is given in the name of damages.

exchange should be calculated according to the rate prevailing at the time
of the trial.

THIS action was brought by an English merchant, upon an
account of goods shipped to the testator; and the only ques-
tion was, as to the proper mode of calculating the interest.

Rawle, for plaintiff, insisted that the interest should be cal-
culated whenever a payment is made, to which the payment
should, in the first instance, be applied; and if it exceed the
interest then due, the balance to be applied to diminish the
principal; if it fall short of the interest, the balance of interest
should not be added to the principal, so as to carry interest.

Ingersoll, for defendant, contended that the interest should
be calculated upon the principal, up to the time of its final
discharge; and be credited by the payments made, with in-
terest calculated on them, from the time the payments were
made, to the same period. But if this be not the correct rule
in general, still, in this case, it should be adopted; as the plain-
tiff had so stated the interest in his account forwarded to the
defendant. As to the general rule also, he contended, that

Smith vs. The Administratrix of Shaw.

although Mr. Rawle's mode might be correct as to bond debts, it was not so as to all open accounts.

By the Court. There is no difference, as to the application of the general rule, between these debts, whose interest is of course to be charged, and those where the jury may allow it by way of damages; and in both, the rule mentioned by the plaintiff's counsel, is the right one. But as the plaintiff has stated it otherwise, we think he ought to be bound by it.

Another question was, whether this being a sterling debt, should be turned into currency at the par of exchange, or at the present rate.

The Court stated that it ought to be at the present rate, to which Mr. Ingersoll assented.

Verdict for plaintiff.

The United States vs. Morrow Lowry et al.

THE UNITED STATES vs. MORROW LOWRY AND JOHN LOWRY.

In the execution of a writ of *habere facias possessionem*, if adverse possession be held, the officer is first to turn out the occupant, and take possession in the name of the law; and, afterwards, deliver it to the plaintiff in ejectment. It is not necessary that the vacant possession shall be immediately delivered to the plaintiff.

The offence of obstructing process, consists in refusing to give up possession, or in opposing or obstructing the execution of the writ, by threats of violence, which it is in the power of the person to enforce; and thus preventing the officer from dispossessing the person so acting.

A mere threat to resist the execution of the writ, is not an offence under the Act of Congress; but if, when the officer proceeds with the writ to the land, and is about to execute his process, a threat is used, by a person forcibly retaining the possession, accompanied by the exercise of force, or having the capacity to employ it, and the officer does not do his duty; the offence is complete.

The officer is not obliged to risk or expose his person, or to proceed to a personal conflict with the defendant.

THESE cases were tried by separate juries. The defendants were indicted, severally, for obstructing the Marshal in executing writs of *habere facias possessionem*, issued from this Court. It appeared in evidence, that the writs of *habere facias possessionem*, issued regularly in each case, on judgments in ejectment recovered in this Court, were delivered to a deputy Marshal; whose commission from the Marshal was called for and produced, with a certificate of his having taken the oath required by the Act of Congress, before a state Judge, and duly certified to the District Judge: that each defendant, when the Marshal went with the writs to execute them, closed his door, was armed, and threatened to kill the officer, if he attempted to dispossess them; declaring, that they would lose their lives, rather than permit the execution of the writs. In

The United States vs. Morrow Lowry et al.

consequence of this opposition, he was prevented from executing the writs.

Rawle, for the defendant, in the first case, contended, that the Marshal was not in the capacity to execute the writ; since it appeared in evidence, that neither the plaintiff in the ejectment, or any person representing him, was with the Marshal to receive the possession.

Levy, for the defendant, in the second case, insisted that nothing was proved against his claims but a menace, which is not punishable by the Act of Congress.

WASHINGTON, Justice, in the first case, charged the jury. In the execution of a writ of *habere facias possessionem*, there are several acts to be performed, which may all be done within a short space of time; but must necessarily be done in succession. If an adverse possession be held, the officer is first to turn out the occupant, then to take possession in the name of the law, and afterwards to deliver it to the plaintiff in ejectment. The offence, which consists in opposing or obstructing the execution of the writ, is complete, when the person in possession refuses, and by threats of violence, which it is in his power to enforce, prevents the officer from dispossessing him. It is nothing to the person, thus obstructing the execution of the process at the threshold, how far it is in his power immediately to deliver the vacant possession to the plaintiff, in the writ. If, then, the jury are satisfied that such obstruction took place in this case, they must find for the plaintiff.

In the second case, the Court said—It is said, that a mere threat to resist the execution of a writ, is not an offence against the Act of Congress. This is true; but if, when the officer having the writ, proceeds to the land, and is about to execute it, such a threat is made by a person retaining the possession, accompanied by the exercise of force, or having the capacity to exercise it, in consequence of which the officer cannot do his duty; it cannot be seriously contended, that the execution

The United States vs. Morrow Lowry et al.

of the process has not been opposed or obstructed; and this is the offence charged, which you are to decide upon. The officer is not obliged to risk his life, or expose himself to personal violence; it is enough that he is prevented, by the exercise of force, or the threat of force, by one in a condition to execute it, from proceeding in the lawful exercise of his functions. It is not necessary for him to proceed to the length of a personal conflict with the defendant, for that would constitute a distinct offence in the defendant, even though the officer should succeed. In this case, the defendant retained, by force, the possession of the house, and threatened to take the life of the officer, if he should attempt to execute the writ; in consequence of which he was prevented from doing it. Should this be your opinion of the evidence, your verdict must be against the defendant.

The Juries, in each case, found the defendant guilty.

C. & T. Bullet vs. The Bank of Pennsylvania.

evidence, if sufficient to prove the loss, and the contents of the paper; and provided such evidence be the best which the nature of the case will admit. This rule does not, in general, apply to bank notes, or to other instruments which pass by delivery only; for, in such case, the payor might be twice charged, were he to be made liable to any person but the one who produces the note or instrument. This, however, being the only reason for the exception, it is to be seen whether it is applicable to a case like the present. When the half of a bank note is presented for payment, the payor may, very properly, require the holder to account for the mutilated state of the note, and to prove that he came fairly to the possession of it. If the latter has it in his power to satisfy the former that he was the fair, *bona fide*, holder of the entire note, and that during such his possession he divided it into two parts, the production of one of the parts would establish his right to the full amount of the note; because, in such case, it could not happen that any third person could fairly acquire the possession of the other half part: for if he took it in a course of trade, and for a valuable consideration, still, he would take it with notice, that the right to the money might be in the possessor of the other half; and would, consequently, be bound by every defence, which could legally be made against the finder or robber. Such person takes the half part of the note, not on the credit of the payor, but of the person from whom he received it.

Judgment for plaintiff, for the full amount of the notes.

Seton vs. The Delaware Insurance Company.

SETON vs. THE DELAWARE INSURANCE COMPANY.

Insurance.—Parol evidence, to prove the regulation of Cuba, prohibiting the exportation of specie, will not be admitted, unless evidence is given of efforts to obtain a certified copy of the written law, which have failed.

If the written and printed clauses of a policy of insurance can be made to stand together, and both be available, such an exposition of them should be adopted.

A partial loss of an entire cargo, by sea damage, if amounting to more than fifty per cent., may, under circumstances, be converted into a technical total loss; but not if a distinct part of the cargo be destroyed, and the voyage be not thereby broken up, or rendered unworthy of being prosecuted.

ACTION on four policies of insurance: two on the cargo underwritten, for 11,000 dollars, and the other valued at 1000 dollars, on board the *William*, at and from New-York to Baracoa, Nevitas, and Matanzas, in the island of Cuba, and back; to return one per cent. for all ports she shall not stop at; declared, in a written clause, to be on goods and specie, both or either valued on the voyage outward at 12,000 dollars, with the usual printed clause of warranty against any charge or loss on account of any illicit or prohibited trade. The third policy is on the ship, and the fourth on the freight for the same voyage, also valued; the one at 4,000 dollars, and the last at 2,000 dollars, with like stipulations for return of premium and warranty. The vessel sailed from New-York on the voyage insured, touched at Baracoa, and thence proceeded to Nevitas, where she disposed of her outward cargo, and took in a return cargo of goods, and 5,000 dollars in silver, besides upwards of 1,000 dollars of the sum she carried outward. She sailed from Nevitas on her return voyage, but by stress of weather, and injury

Seton vs. The Delaware Insurance Company.

sustained, she was compelled to put into Matanzas, where the 5,000 dollars taken in at Nevitas, being more than half the value of the cargo, were landed by order of the governor; the supercargo was permitted to lay out the money in the produce of the island, and to take it away; but he was refused permission to carry away the specie. Upon the petition of the captain to the subdelegate of the royal hacienda at Havana, setting forth that he had received regular clearances at Nevitas for the specie, and that it was seized, that officer decreed that the specie should not be taken away; stating in his decree, that specie was prohibited by law to be carried away, but permitting the same to be laid out in colonial produce. Upon this, the supercargo laid out about half of the 5,000 dollars in sugars, which filling the vessel, he deposited the balance of the silver with a merchant at Matanzas, who afterwards laid it out in sugars, and sent them by another vessel, the Charlotte, to New-York. Regular protest being made, the ship left Matanzas, and arrived safe at New-York, with the loss of part of her cargo, which had been thrown overboard in a storm. She arrived on the 20th of December 1806. A regular abandonment of ship, cargo, and freight, was offered and refused; but the plaintiff was authorized by the defendants to dispose of the vessel and cargo, as well that brought in the William, as the sugar afterwards sent in the Charlotte, without prejudice. On these sales a loss was sustained, as stated by the plaintiff, to the amount of upwards of 8,000 dollars.

To prove that this was a prohibited trade, the defendants offered to examine a witness. This was opposed, and 2 Cra. 336. 187, relied upon, to prove that the law or order of the governor should be produced.

The Court rejected the evidence: This is a commercial regulation of the government, and a subject of pure municipal arrangement. The law must be presumed to be written, and therefore it should be produced; or evidence given to prove

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that it was not in the party's power to obtain a certified copy of it; in which case inferior evidence might be received.

Dallas, for plaintiff, upon the Court intimating, that, as to the vessel, there was no ground of abandonment, she having performed her voyage in safety, and even arrived before the offer made, gave it up, and claimed only for a partial loss. As to the cargo, he insisted that the clearance was evidence of the legality of the trade; but if not so, the written clause, which insures specie out and home, overrules the printed clause of the warranty; and as the defendants knew, or ought to have known, that it was prohibited, they are bound, the policy, insuring a trade prohibited by foreign laws, is good. Park, 235. As to the freight, he argued that the right to it on the whole cargo having once attached; the loss of so great a proportion, by a peril insured against, amounted to a total loss.

Rawle and Condy, for defendants. If there had been no clause in the policy, to exempt the defendants from indemnifying against losses incurred, in consequence of any illicit or prohibited trade; yet, upon general principles, such a trading would have exonerated the underwriters. 2 Vern. 176. 4 Bac. 643. 1 John. New-York Term Rep. 20. That this was a prohibited trade, is proved by the best evidence, the sentence of the Hacienda, a revenue tribunal, uniting judicial with executive powers. The true exposition of the policy is, that if the goods shipped, and the specie, should be subjects of lawful trade, then the underwriters were to be liable, in case of loss; otherwise not. But, at all events, the plaintiff could not abandon. The loss of part of the cargo only, if the vessel with the balance arrived safe, can only be a partial loss.

WASHINGTON, Justice, charged the jury. The question now is, whether the plaintiff is entitled to recover for a total or a partial loss on cargo and freight. Upon the construction of the policy, it is said that the written must control the printed clause, if they contradict each other. This is true. There

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are strong reasons in favour of the position. But the construction of policies of insurance, is governed by the same rules as apply to other written instruments; and if all the clauses can be fairly made to stand together, and to have effect, they should be so expounded as to produce such a result. We understand the underwriters, from the language they have used, to say, we will insure you against loss upon any goods or specie, both or either on the voyage from New-York to the enumerated ports in Cuba, and back to New-York. As to the cargo, generally, it is impossible for us to know whether it may in whole or in part be composed of prohibited articles, or not; and, therefore, we will not engage to indemnify against losses arising from such trade, if it should be illicit. But as to specie, the specified article, we know that it is, by the general commercial regulations of the Spanish government, prohibited from being exported, and therefore we except it from the clause of warranty. We say, that this ought to be understood as the language of the underwriters; because, as to the course of trade, and the general laws of the country with which this trade was to be carried on, they were bound to take notice; and if it was not their intention to except specie from the warranty, it is impossible to suggest a reason for its being specially mentioned; since it would clearly have been comprehended under the general term goods, used in the same clause. Still, the question is, can the plaintiff recover for a total loss of cargo and freight, in consequence of the detention of the 5000 dollars at Matanzas? The opinion of the Court is, that he cannot. The loss is not total, either in fact, or technically so. A part of the cargo was taken out, forcibly, at Matanzas, and replaced by other articles; with which, and the residue of her cargo taken in at Nevitas, she arrived, fully loaded, in safety at the port of destination. The original cargo, taken in at Nevitas, received no kind of injury from any thing which happened at Matanzas; and the only consequence of the proceedings at that place, was the exchange of a part of the cargo, the whole of which arrived safe, partly in this vessel, and the residue of the

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new cargo, by another. Now, can it be seriously contended, that the loss of a distinct and separate part of the cargo, by the seizure of a foreign government, though it amount to more than half of the whole cargo, will warrant an abandonment of the whole, when the residue has in fact been discharged, and has arrived safe? A partial loss of an entire cargo, by sea damage, if amounting to more than half, may, under circumstances, be converted into a technical total loss; but not if a distinct part of the cargo be destroyed, and the voyage hence thereby broken up, or rendered unworthy of being prosecuted. Here the voyage was not lost, or otherwise impaired or affected, but in respect to the particular part of the cargo exchanged at Matanzas. We inquired of the plaintiff's counsel, if he recollected any case in which such a loss had been construed total; and the only one to which he referred us, was that of *Simond vs. The Union Insurance Company*, decided in this Court. But there is no similitude between that and this case. In that, the vessel was not only prevented by a blockading squadron off one of her ports in St. Domingo, from entering either; but she was forcibly carried to Jamaica, and there compelled to end her voyage, and to dispose of her cargo. There, the voyage was broken up, and completely frustrated; quite otherwise in the present case. We do not recollect a single case, from *Goss vs. Withers*, to this time, or before, in which, from an injury to the cargo, the loss was considered total; that the voyage was not broken up by some disaster to the vessel, which could not be repaired without great additional expense and loss; or which prevented the further prosecution of the voyage; or where the injury to the cargo was general. The doctrine of abandonment has gone far enough, perhaps too far, when the real nature of the contract of insurance is considered. We do not feel disposed to carry it further. The opinion of the Court, therefore, is, that the plaintiff is entitled to recover only for a partial loss.

The jury found that the plaintiff was entitled to a partial loss, which the parties agreed to adjust.

law of Pennsylvania,
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ence may be given un-
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has been extinguished by
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the danger of a double pay-

this case, at April
the cause now came
being indebted to the
in September 1804,
state. The plaintiff,
state of Delaware,
under the pro-
promissory notes
gave a receipt, ex-
the defendant's an-
Albert, provided that

Lathén vs. Pecholier.

the said notes are paid. The plaintiff, after the notes in question became due, brought this suit; and a meeting of the plaintiff and defendant, with a view to a settlement, took place at the office of a Mr. Duplessis. This person proved, that, after some discussion, the plaintiff agreed to accept of six hundred dollars, in satisfaction of the debt due from the defendant, of which one hundred and twenty-two dollars were to be paid in two days; and for the balance, the defendant was to give his note to Duplessis, who was to endorse it, specially, without recourse upon him; but to be endorsed, (as *Judge Washington* understood the testimony, but not so understood by the defendant's counsel, or by *Judge Peters*,) to some person to be named by the plaintiff. The money was to be paid to Duplessis for the plaintiff, and he was to draw the notes. In consequence of this agreement, the plaintiff and defendant went to the Marshal's office, and an entry was made on his docket, and signed by the plaintiff, opposite to these suits, "return writ settled." Within the specified time, the defendant paid to Duplessis the one hundred and twenty-two dollars, of which Duplessis gave notice to the plaintiff, who refused to receive it, unless the defendant also delivered him the notes with an endorser. It does not appear that the plaintiff named the endorser, or that the defendant offered to deliver the notes at all. The defendant put in the plea of payment, with leave to give in evidence the special matter; and also a plea of duress. The defendant's counsel gave notice to the plaintiff's counsel, that at the trial he should, under the plea of payment, give in evidence the agreement between the parties, made after the institution of the suit, and should also rely on the duress. When the defendant offered to give evidence of the agreement made at Duplessis's office, it was opposed by the plaintiff's counsel, upon the ground that payment refers to the time of the action brought; and that in this Court, where there is an equity and a law side, no evidence short of actual payment, and even that, antecedent to the action brought, could be given; though it was admitted, that

Lafée v. Peshollen.

under an old-law of this state, operating upon the state tribunals, which unite the law and equity jurisdictions, any evidence may be given, which tends to show that the debt ought not to be paid. The agreement in this case, having never been executed, cannot, upon any principle, be given in evidence on this plea.

Washington, Justice. The objection is premature at present. We do not know what the agreement was, or whether it was executed or not. The evidence was then given.

Dallas, for the defendant, contended that the plea of duress was, in this case, a complete defence against the plaintiff's recovery on these notes. The defendant having been discharged under the insolvent laws of this state, could not be legally arrested for the same debts in Delaware.

By the Court. The arrest in Delaware being legal, by the laws of that state, a Court of this state could not consider it unlawful, although it would have been unlawful had it been made in this state. The plea of duress, therefore, cannot be supported.

Secondly; Mr. Dallas contended, that the suit was discontinued in consequence of the agreement at Rapiensis's office; but, at any rate, that agreement having been executed by the defendant, as far as it was in his power, is a satisfaction of the notes given in Delaware, and may be given in evidence, under the plea of payment, with leave; for any defence may be given under this plea, which shows that the plaintiff, *ex equo et bono*, ought not to recover. The defendant paid the money, which, by the agreement, he stipulated to pay; and the refusal of the plaintiff to accept it, unless the defendant would deliver him notes, with an endorser, to be named by the plaintiff, (which he was not bound to do,) dispensed with the necessity of a regular tender of notes.

Messrs. Levy and Philips, for plaintiff, contended, that the defendant having pleaded to the action, it was too late to insist upon the discontinuance of the suit; that the defendant had not

Estoppel to Recoholier.

made such an offer to perform his part of the agreement, as he was bound to make; and that if he had done so, still a promise of a lesser sum, though the security be bettered, and though it be accepted, is not a satisfaction. Were this a suit in equity, the Court would not assist the defendant, without his offering to pay the whole six hundred dollars.

Dallas, in reply, stated a new point; viz., that the plaintiff could not recover, without first delivering up the defendant's endorsements, which formed the consideration of the notes in suit, and which may hereafter come against him.

WASHINGTON, Justice, charged the jury. The defence is, first, to the action, and secondly to the claim, on which the action is founded. It is said that this suit was once discontinued, and could not afterwards be replaced on the docket, without the assent of the parties; if not so, still that the debt created by these notes, was discharged by the subsequent agreement, which took place at Duplessis's office. The first defence cannot be noticed under either of the pleas in the cause, being incompetent with them. This amounts to saying that there is no cause in Court, and the pleas admit there is, but controvert the right of the plaintiff to recover in it. The defendant ought to have taken advantage of the discontinuance at an earlier period, and in a different way. By appearing and making defence, he waives the objection. The second ground of defence is consistent with the plea of payment, if the defence itself be good. This is the way in which we understand the contract made at Duplessis's office, according to his evidence. That the plaintiff agreed to receive of the defendant six hundred dollars, instead of the sixteen hundred dollars which he owed him, upon condition that one hundred and twenty-two dollars of the money was paid to Duplessis for the plaintiff, in two days; and the balance in a note, to be drawn payable to Duplessis, who was to endorse, without recourse, but which was to be endorsed by some person, to be named by the plaintiff. As to this second

Latafee vs. Peabody.

endorser, the evidence being differently understood by the defendant's counsel, and by the District Judge, I shall consider the case both ways. If my understanding of the agreement be correct, then it is the opinion of the Court, that the defendant has not shown either an actual or a technical performance on his part. He ought to have offered the notes signed, and endorsed by Duplessis, and tendered himself ready to have it endorsed by such a person as the plaintiff should nominate. If he seeks to make his offer to perform equivalent to performance, it lies upon him to show that he did all that was in his power, or offered to do it. It is said that the plaintiff dispensed with the offer, as I have stated it, by refusing to take the money, unless the note was endorsed. But, if I take the agreement correctly, had he not a right to make the objection; and when made, ought not the defendant to have proceeded as far as he could? Certainly he ought. But, secondly; if by the agreement a responsible endorser was not to be given, then where is the ground, even of equity, for considering this agreement a discharge of the prior debt? What is it, but an excusatory agreement, induced by no consideration whatever, to take six hundred dollars, in lieu of sixteen hundred dollars? and would equity enforce such a contract? Surely not. I speak of the equity of the case, because it is laid down, that under the plea of payment with leave, evidence may be given, which shows that *ex equo et bono*, the debt claimed should not be paid. I understand the law to mean, that if the debt has, in whole or in part, been actually paid, or if by any means it has been extinguished, as by a contract of a superior nature; or has been released; or if the debt be not in conscience due; or has by some means been satisfied, so that it would be unconscientious in the plaintiff to demand it; such evidence may be given. But this debt has not been paid, or released, or extinguished, by a contract superior in dignity to the original debt, which was once fairly due; it has not been satisfied; nor would the agreement, if executed, have amounted to a satisfaction, being for less

Latapée vs. Pecholier.

sum, without even the consideration of bettering the plaintiff's security. *Ex equo et bono*, then, this debt is still due; and nothing has occurred, actually or technically, to discharge it.

The last point is susceptible of more argument, in favour of the defendant. The paper which had produced the liability of the defendant, and in discharge of which the notes in question were given, is negotiable; and if it has been transferred by the plaintiff, the defendant may hereafter be called upon to pay it, by a *bona fide* assignee, without notice; against which claim, the payment of these notes would not protect him. But I think the agreement of the parties, made at the time when these notes were given, precludes the defendant from making this objection; at any rate, until he is ready to pay the money. Though there is no reason, in point of law, why judgment should not be given for the plaintiff, still the Court would have it in its power to protect the defendant against the supposed danger of being twice made liable; by staying execution until the note is produced, or by enjoining the judgment. On this latter point, my brother Justice doubts, whether the objection does not go to the right of the plaintiff to recover in this action, until the note is produced.

The plaintiff's counsel undertook to produce the note before the money should be paid; and to give any security to indemnify the defendant against all other claims.

Verdict for plaintiff.

Murray et al. vs. The Insurance Company of Pennsylvania.

MURRAY & MUMFORD vs. THE INSURANCE COMPANY OF PENNSYLVANIA.

The plaintiffs effected insurance in New-York, on the Hope, from Gibraltar to New-York, to the amount of four thousand dollars, valuing her at that sum; and they afterwards effected insurance on her with the defendants, to the amount of four thousand dollars, valuing her at six thousand dollars, without notice to the defendants of the prior insurance. A partial loss occurred, and the plaintiffs claimed to charge a partial loss, upon the whole amount insured by the defendants in the second policy.

The defendants are liable for as much of the agreed value of the Hope, as is not covered by the prior insurance, being to the extent of two thousand dollars.

As the plaintiffs claim only a partial loss, the defendants are not entitled to an abandonment.

It is not the incapacity of the assured to abandon, or his failure to do so, which can defeat his right to a recovery, unless he claims for a total loss.

It was not necessary to give notice of the first insurance to the defendants.

In case of a total loss, when two insurances have been made, the assured may abandon to the second underwriters, and take from them so much as the second policy covers.

THIS was a case stated for the opinion of the Court. The plaintiffs, on the 21st of October 1803, effected insurance on the ship Hope, from Gottenburgh to New-York, in the office of the New-York Insurance Company, to the amount of four thousand dollars, valuing her at that sum. On the 30th of December, in the same year, they effected insurance on the same ship and voyage, to the amount of four thousand dollars, in the office of the defendants, valuing her at six thousand dollars. But, at the time of effecting this last policy, the defendants had no notice of the insurance made at New-York. The real value of the ship, when she sailed from New-York, exceeded

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six thousand dollars. A partial loss, by one of the perils insured against, took place; and the question for the opinion of the Court was, whether the defendants are liable, on the last mentioned policy, for the amount reported by the referees, as per report filed; or whether the said last mentioned policy is void, by reason of the prior insurance? The referees reported the sum of ——— thousand dollars to be uncovered by the first policy. Both the policies contain the usual printed clause, "that if the assured shall have made any other insurance upon the premises aforesaid, prior in date to this policy, then the said company shall be answerable, only for so much as the amount of such prior insurance may be deficient towards fully covering the premises hereby insured; and the said company to return the premium upon so much of the sum by them insured, as they shall be by such prior insurance exonerated from."

Rawle and Lewis, for the defendants, contended, that the first policy being valued, the one in question having been effected without notice of the first, is void; because, in case of loss, the insured had deprived himself of the power of ceding any part of the property saved, to the defendants; the first underwriters being entitled, upon abandonment, to the whole. They relied upon the case of *Yard's Assignee vs. Murgatroyd*, in the Supreme Court of Pennsylvania; and the case of *M'Kim vs. The Phoenix Insurance Company*, in this Court, ante, 89. Also, that the plaintiff was bound by the valuation of the first policy.

Mallowel and Here, for the plaintiffs, argued, that the first policy created an estoppel, as to the value of the property, except as between the parties to that policy. 1 Marsh. 200. *Emerigon*, 275. 1 *Johns. New-York Rep.* 385. That the cases cited on the other side do not apply; because, in those, the question was not whether the plaintiff could recover any thing upon the second policy, but how much he was entitled to: that, although the plaintiffs might have defeated their right to recover in this action, if they had abandoned to the first under-

Murray et al. vs. The Insurance Company of Pennsylvania.

writers, yet as they do not go for a total loss, and have not abandoned, the argument cannot affect them.

WASHINGTON, Justice, delivered the opinion of the Court. The parties to this suit have agreed, by the policy on which the action is founded, that the property insured was worth six thousand dollars; and the defendants bound themselves to the extent of four thousand dollars, the sum subscribed to cover so much of the agreed value, as had not been covered by any prior assurance. It turns out, that four thousand dollars of that value had been previously insured in New-York. As to that sum, therefore, the defendants are not liable; but they would have been liable to that amount, had the agreed value of the property been eight thousand dollars; because so much of the value was uncovered by any prior policy. But, as in the present case, only two thousand dollars of the value was uninsured when the last policy was effected, the defendants cannot be called upon for a sum exceeding that so left uncovered. This is the plain import of the contract between these parties; and why should not the defendants comply with it? The reasons assigned, are, that the first policy being valued, the insured, in case of a total loss, must have abandoned the whole property saved, to the first underwriters, and were thereby incapacitated to cede any thing to the defendants; without doing which, they could not demand a total loss from the defendants; and that the omission to communicate to the defendants the existence of the first policy, is such a concealment as renders this policy void in its inception. In answer to these objections, it is sufficient to say, that the plaintiffs do not claim for a total loss; and in point of fact, if this were material, they have not abandoned to the New-York Company. Claiming only for a partial loss from these defendants, they are not entitled to an abandonment. It is not the incapacity or the failure to abandon, which can defeat the right of the insured to recover, unless he goes for a total loss. But if the law were otherwise, still the insured is not in-

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capacitated to abandon to the second underwriter, until he has deprived himself of the power of doing so, by having previously abandoned to some other underwriter. It was correctly observed, by one of the plaintiffs' counsel, that he might, if he chose, and sometimes it might be his interest, abandon to the underwriters on the second policy, and take from them so much as such policy, from the terms of it, covered. It follows from these principles, that whether there was or was not a prior policy, was a circumstance of no consequence to the underwriters on the second, except as to the amount for which the latter, in case of loss, might be liable; and, therefore, notice of such prior policy to them, was unnecessary and idle. Besides, the very terms "in case the assured shall have made any prior assurance," imply, that whether he has made such or not, is a fact unknown to the underwriter on the second policy. The case of *M'Kim vs. The Phoenix Insurance Company*, is, so far as it resembles the present case, against the defendants. In that case, the first policy was underwritten by the Philadelphia Insurance Company, to the amount of twelve thousand dollars, and was clearly open. The Phoenix Company afterwards underwrote fifteen thousand dollars, on the return cargo of coffee, valuing the same at twenty-two cents per pound; and the question before the Court was, whether the plaintiff could recover any thing upon the latter policy; and if any thing, how much? The Court decided, that the first policy covered as much of the coffee, as twelve thousand dollars would absorb at prime cost, and charges, instead of the value fixed on that article in the second policy; which, of course, would leave to be covered by the second policy, as much less of the cargo, as the difference between the prime cost and charges, at twenty-two cents per pound, would amount to. For so much of the cargo, the Phoenix Company was held to be answerable. The Court also decided, that the subsequent agreement of the Philadelphia Company to waive all their right to the property, which might be saved, could not change the nature of the contract

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entered into by the plaintiff with the Phoenix Company; because, at the moment the latter was made, no more of the cargo was insured than that which the first policy left uncovered, and was void, as to so much as was so covered. If so, the subsequent agreement with the Philadelphia Company was, in relation to the Phoenix Company, *res inter alios acta*, and could not affect the rights of the Phoenix Company. The notice spoken of, in that case, was not in relation to the existence of a prior policy, but the nature and extent of it. The case of *Yard's Assignees vs. Murgatroyd*, is very imperfectly stated; but it appears, so far as we understand it, to resemble this as little as the one just noticed. The opinion of the Court is, that the plaintiffs are entitled to recover the sum reported by the referees.

Gallagher's Executors vs. Roberts et al.

GALLAGHER'S EXECUTORS vs. ROBERTS, CADMAN, & COMPANY.

A bill of exchange is not, in general, to be considered as a satisfaction of a pre-existing debt, unless it be paid or accepted as such; nor if remitted conditionally, unless the debtor sustain injury by the laches of the creditor who received it.

The strict rules of law relative to the presentation, and notice of the dishonour of a bill of exchange, do not prevail in the same manner against a creditor, to whom the bill has been remitted in payment, as they do against the holder of a bill under other circumstances.

Although notice of the dishonour of a bill may not have been received by the person who remitted it, it will be sufficient to discharge the holder, if he did all in his power to convey the information of it to him.

WASHINGTON, Justice. The case, from the bill, answer, and exhibits, appears to be as follows:—The testator, James Gallagher, being indebted to the defendants for goods shipped to him; remitted to them, in December 1793, a bill of exchange, at sixty days, for one hundred pounds sterling, drawn by Robert Morris, on Cazenove, Nephew, & Company, of London; which came to hand on the 24th of February 1794. The next day it was shown to the drawees, who declined accepting it at that time, but gave reason to think, that after hearing from Morris, they might do so. The bill was accordingly kept until the 24th of March following; when, the drawees still refusing to accept it, the bill was placed in the hands of a notary, who regularly protested it for nonpayment. The bill was retained by the defendants until the 7th of July 1794, when it was returned with the protest; previous to which, it is admitted, that notice of the dishonour of the bill, or of the drawees' refusal to accept, had not been given. This letter of the 9th of July, was put into the post-office at the time it was written. No evidence is given, in the cause, of the time when the drawer be-

Gallagher's Executors vs. Roberts et al.

came insolvent, or indeed that he ever was so. But it is recollected by the Court, that, on the trial at law, it was proved, and is so agreed by the parties, that Mr. Morris failed in the year 1794, or perhaps in 1795.

No proof is given, that the above letter and bill ever came to the hands of Gallagher. It appears, by a letter from the defendants in 1796, that between 1794 and that period, he had frequently written to Gallagher, requesting payment of the debt due to him; to which letters no answer had been returned, nor remittances made. The defendants, at the same time, appointed an agent to call upon Gallagher, and collect this money; who, in 1798, informed them that they could do nothing with Gallagher, and that he insisted upon a credit for the above bill, supposing that it had been paid to Roberts.

A judgment having been recovered at law against the complainants, without the allowance of a credit for the above bill, relief is now sought for, on the equity side of this Court, for the amount thereof. In the case of *Clark vs. Mundel*, the doctrine is laid down in very broad terms, that a bill, given in payment of a precedent debt, is not considered as payment; unless it be part of the contract, that it be received in satisfaction; although the holder should have neglected to present it for payment, or to give notice of its dishonour. This doctrine is clearly founded upon a general principle of law, that the bill, in such a case, not being of superior dignity to the pre-existing debt, could not extinguish it; and consequently the bill was considered only as a collateral security. Kyd, in his *Treatise on Bills*, seems to consider this doctrine as no longer existing, in consequence of the statute of Anne; which declares, that a bill accepted in satisfaction of a former debt, shall be accounted a full payment of such debt, if the holder do not take his due course to obtain payment of the bill, and on failure, make his protest according to the directions of this Act. But Chitty attributes the change of this doctrine, not to the seventh section of the above Act, which relates to the particular kind of

bills mentioned in the fourth section; but to the change of opinion in the Courts of Justice. To whatever cause the doctrine of the present day may be attributed, we think the doctrine itself amounts to this: that a bill of exchange is not, in general, to be considered as a satisfaction of a precedent debt, unless it be paid, and accepted as such, or in case it be conditionally paid; unless it appear that an injury has resulted to the debtor, who pays the bill in consequence of the laches of the creditor, who receives it; as, for instance, if, in the mean time, the drawers fail; or if the recourse of the person from whom the bill is received, against the drawer, or the endorsers, be thereby lost. Neither would such a bill, if received as a payment, be in all cases good as such; should the same be unproductive, from the circumstance of the drawer having no right to draw, and perhaps from other circumstances, which show that the debtor knew the paper to be of no value. We do not think that the rule, which prevents the holder of a bill from recovering upon it against the drawer or endorsers, unless he has proceeded regularly to have the bill presented and protested, and to give notice; applies to the case of a creditor suing for his original debt, to which is opposed a payment by a bill or note; because, in the former case, the bill is received by the payee, and all others who become the holders of it, upon a condition that he will use such diligence; and, therefore, his failure to perform such condition, is fatal to his recovery. In the latter case, the bill is not strictly an extinguishment or satisfaction of the pre-existing debt; though, if by the neglect of the holder, the amount of the bill be lost, it is fair to presume that he took it as a satisfaction, and agreed to run the risk of it. Neither will we say, that, if the bill be retained by the person to whom it is remitted as a conditional payment, for an unreasonable length of time, a Jury may not fairly make the same presumption; though the drawer should not become insolvent. In the case of *Darrah vs. Savage*, 1 Show. 130, the bill was retained for two years.

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In all the cases which we have met with on this subject, the debt was lost by insolvency. Judge Buller, in his *Nisi Prius*, 182, lays it down, that if a note be endorsed by a debtor to his creditor for a precedent debt, and a receipt be given as for so much money when the note shall be paid, and the creditor neglect to apply to the drawer in time, and by his laches the note is lost, the precedent debt is extinguished. So in the case of *Chamberlain vs. Delarue*, 2 Wilson, 353, the same principle is laid down. In the case of *Ward vs. Evans*, 2 Ld. Ray. 930, the general rule is laid down, that a note is not a payment of a precedent debt; being presumed to be taken on condition, to be payment, if paid in a convenient time; but if it be kept up without demand, and insolvency take place, the receiver must lose it. 'If this be the law of the case, what is the ground of equity, on which the Court ought now to relieve the complainant? It appears, clearly, from the answer and exhibits, that this bill was remitted as a conditional payment, and was received as such. The return of it to the endorser, Mr. Gallagher, is conclusive upon this point. Although the refusal of the drawee to accept, was not regularly noted, yet the bill was promptly shown to the drawee; and the defendant states that he forbore to protest it for nonacceptance, from a hope, which was induced by the declarations of the drawee, that they might accept it after hearing from the drawer.

Though notice of the protest was not given, in such time as would have enabled the defendants to have maintained an action upon it, yet the bill was returned to Gallagher during the solvency of the drawer; and no injury appears to have been sustained by him in consequence of the delay. It is true, that no evidence is given that the bill ever came to the hands of Gallagher. His neglect to answer the repeated letters addressed to him by the defendants, which afforded him an opportunity to assert his right to this sum, as a credit, upon the ground of the bill not having been returned; affords strong ground to believe that he had received it, notwithstanding his declaration

Gallagher's Executors vs. Roberts et al.

to the contrary, in 1798. But, at all events, the defendants were not answerable for the miscarriage of their letter covering the bill.

Upon the whole, we are of opinion, that the complainant is not entitled to relief; and, therefore, that the injunction must be dissolved, and the bill dismissed.

PENNSYLVANIA,

Mott vs. The Assignees of Maris, a Bankrupt.

MOTT vs. THE ASSIGNEES OF MARIS, A BANKRUPT.

The sixty-fifth section of the Bankrupt Law of the United States, passed the 2d of March 1799, does not repeal the provisions of the laws of the United States, which give to the surety who pays bonds for duties, a preference over other creditors.

The provisions of the Bankrupt Law except from its general operation, not only the preference of the United States, but also the right of preference for satisfaction of debts due to the United States.

JUDGMENT was agreed to be entered in this case for the plaintiff, subject to the opinion of the Court on the following point: Whether a surety on certain custom-house bonds, having discharged the same after the date of the commission of bankruptcy, some of which were due before, and some after the date of the commission; can recover the amount so paid in the present action, and is entitled to a preference over the general creditors, to be first paid out of the effects of the bankrupt, in the hands of the assignees.

WASHINGTON, Justice. The only question is, whether the plaintiff is entitled, under the sixty-fifth section of the Act of March 2d 1799, to recover against the assignees, the full amount of what he has paid to the United States, as surety for the bankrupt, in the custom-house bonds mentioned in the case. The only difficulty is, whether this section of the law, so far as it respects the preference given to the surety, be or be not repealed, by the general terms of the bankrupt law. It is admitted, that it is not repealed in express terms, although it is certain that the general terms of the law make no discrimination in his favour; and, in some respects, there is an apparent inconsistency between the provisions of the first, and those of the

Mott vs. The Assignees of Maria, a Bankrupt.

second law, in relation to such preference. On the other hand, it may be said, that the first law went very far to place the surety, who has discharged the debt, on the pre-eminent ground on which the United States stood, by authorizing him, instead of pursuing his common law remedy against the principal, to bring his action on the bond itself, though given to the United States; thus, in a measure, sheltering him under the high prerogative rights of the United States.

It may be contended, that upon the principle admitted in Courts of equity, the surety, if first resorted to, and obliged to pay, may claim the advantage of all the securities which the creditor possessed against the principal, and which he might have enforced, had a recovery been had, in the first instance, against the principal; and that his situation ought not to be rendered worse, by the election made by the creditor, over whose conduct he had no control. It might further be said, that the sixty-second section of the bankrupt law, does not merely save from the general operations of that law, the preference due to the United States, but the right of preference to satisfaction of the debts due to the United States; that this was a debt due to the United States, entitled to certain privileges; and that, consequently, the bankrupt law never attached either to the right of the United States, or to the debt itself. We feel some doubt, whether this be the correct construction of the law; but, as it has been adopted by the Supreme Court of this state, our respect for the talents of that Court, and our wish that as little collision as possible, should take place between the decision of the federal and state tribunals upon the same questions, will induce us also to adopt the same construction. *Judge Peters* entirely concurs in that opinion.

Though, in the case referred to, the payments were made by the surety before the bankruptcy of his principal, still there is no difference between that and this case, if the right of preference of the surety remains unaffected by the bankrupt law.

Judgment for the Plaintiff for his full demand.

plaintiffs have produced
not give evidence, that
instituted in another Court.

case of action. The
debt, due for goods
defendant was proceed-
the agent of the plain-
writ against the de-
the Supreme Court, or
when the Court, refer-
said, that the inquiry
be gone into.

it, cited the case of
2 East, 454.

affidavit at all in the
case from 2 East,
the other Court, was
made.

whether the action,
of this state, is for
the plaintiff in
which probably the
rule of the Court is

Note Discharged.

Gernon vs. Bocaline.

GERNON vs. BOCCALINE.

In equity.—Where the replication denies all the allegations in the plea, then plea must be supported by evidence.

If an answer to any particular charge in the bill deny the same, it must be opposed by the plaintiff, by two witnesses, or by one and circumstances. A plea in avoidance of, and not responsive to the bill, stands for nothing as evidence of the facts stated in it.

PLEA to the jurisdiction of the Court, (sworn to,) that the plaintiff was, at the time of filing his bill, a citizen of the state of Pennsylvania. To the plea, a general replication was filed. The deposition of one witness was read, who proved that the plaintiff, in the summer of 1807, removed into the state of New-Jersey, with his family, sold part of his furniture after his leaving this state, and removed the rest to his place of residence at Burlington.

M. Levy, for defendant, observed, that the plea, being sworn to, could not be overruled by the deposition of one witness.

WASHINGTON, Justice, delivered the opinion of the Court. The replication having denied all the matter of the plea, the latter must be supported by evidence. If an answer, responsive to any charge in the bill, deny the same, it must be opposed on the part of the complainant, (who makes this part of the answer evidence, by calling upon the defendant to give evidence against himself,) by two witnesses, or by one witness, with the addition of circumstances. But a plea is always in avoidance of the bill, and never responsive to it. It of course stands for nothing, as evidence of the facts stated in it.

Plea overruled.

Scull vs. Briddle.

SCULL vs. BRIDDLER.

After bail given, and plea pleaded, the defendant cannot arrest the judgment on the ground of misnomer.

By the provisions of the Act of Congress, a variance, which is merely matter of form, may be amended at any time.

The proceedings were amended by the recognisance of bail, and the name of the defendant, in the recognisance, inserted in the declaration.

MOTION in arrest of judgment, because the writ was against Edward Briddle, and the declaration against Edward Biddle. The defendant gave special bail by the name of Edward Briddle. Cases cited by defendant's counsel, 2 Wils. 394. 8 T. Rep. 611.

WASHINGTON, Justice. It was competent for the defendant to have pleaded in abatement, that he was sued by the name of Edward Biddle, whereas his name was Edward Briddle. But instead of this, he gives bail by his right name, and pleads in bar of the action. The variance is mere form, and the Act of Congress, in such a case, permits the Court to amend at any time. Let the proceedings be amended, conformably to the recognisance of bail.

Motion overruled.

Ketland vs. The Administrator of Lebering.

KETLAND vs. THE ADMINISTRATOR OF LEBERING.

The *roll d'equipage* is good evidence of the shipment of the seamen, and of the contract made in relation to wages.

Where a person called *Lebrun* and *Lebring*, was on board a vessel, as a seaman, and no person among the crew of the name of *Lebering*, the Court gave to the administrator of Lebering, the wages due for the services of the person so designated.

Letters of administration to the estate of Lebering having been granted by the proper authority, the Court will take the fact to be, that the person is dead, who is represented by the administrator.

THIS was an appeal from the District Court. The libel stated, that John Lebering was shipped on board of the *Mercury*, at Philadelphia, upon a voyage to the river La Plata, and that: that he performed his duty as a mariner on board the said vessel, until she was captured by a British cruiser, when the said Lebering was taken from the said vessel, by the captors; and that the vessel was condemned as prize, by the Vice Admiralty Court at Halifax; which sentence was reversed upon appeal, and the vessel restored to the owners; that the said Lebering afterwards died, and that the libellants have regularly obtained letters of administration upon his estate.

The answer denies that any such person as John Lebering, was on board the said vessel during the said voyage. To this answer a general replication was filed.

Peters, for the appellant, admitted, that, in point of law, the representative of the mariner was entitled to full wages, as decreed by the District Court, provided it appeared, in point of fact, that the intestate was a mariner on board the vessel. The depositions in the cause, proved that no person of the name of Lebering, was on board this vessel during the voyage; but that there was a mariner named John *Lebron*, or *Lebring*; and that

Kethand vs. The Administrator of Lebering.

there was no other person on board, whose name in any manner resembled that of the intestate, or the person named by the witnesses. The counsel for the appellant, offered in evidence the *rol d'équipage* of the vessel, having proved by the testimony of the captain, that the shipping articles were lost.

This evidence was opposed by the counsel for the appellee, but admitted by the Court, who said, it is an original paper on board the vessel, and is complete, though its weight may be a subject of consideration. On this paper was entered the name of Jno. Laban, as a mariner.

WASHINGTON, Justice. We can entertain no doubt, that Jno. Lebering, the intestate, was a mariner on board this vessel. He was sometimes called Lebrus, and sometimes Lebring; but we know, by every day's experience, that a false pronunciation of surnames is frequently given, particularly with a view to the abridgment of them. It being proved that there was but one person on board, whose name resembled Lebring, or Lebrus; it is impossible that the appellant can ever be made liable by any other person, of the name of Lebering, for the wages now claimed. Though it is not proved that John Lebering is dead, yet we must take the fact to be so, as the appellee has duly obtained uttermost administration upon his estate.

Decree affirmed.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, OCTOBER TERM, 1808.

JUDGES { Hon. BUSHROD WASHINGTON, Associate Justice of the
Supreme Court.
Hon. RICHARD PETERS, District Judge.

MORRIS vs. SUMMERL.

If one merchant is in the habit of effecting insurances for another, and neglects to have the same done, when ordered, he is himself answerable for the loss, as if he was the insurer, and he is entitled to the premium.

THE Court charged the jury, in this case, that if one merchant is in the habit of effecting insurances for his correspondent, and is directed to make an insurance, and neglects to do so, he is himself answerable for the losses, as insurer, and is entitled to a premium, as such. That the amount of loss, for which an underwriter who had subscribed the policy, would have been answerable, is the only measure of damages against him. If he can excuse himself, for not having effected the insurance, he is answerable for nothing; if he cannot excuse himself, he is then answerable, for the whole.

Verdict for plaintiff.

NOTE.—An exception was taken to this charge, and a writ of error sued; but in February 1809, the judgment was affirmed in the Supreme Court.

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The United States vs. Liddle.

THE UNITED STATES vs. WILLIAM LIDDLE.

Indictment for an assault and battery, on a member of the legation from Spain.

The certificate of the Secretary of State, dated subsequently to the assault and battery, is the best evidence to prove the diplomatic character of a person, accredited as a minister by the government of the United States.

Parol evidence was admitted, to prove the period when a person was considered by the government of the United States as a minister.

The law is the same in the case of a defendant charged with an assault of a minister, as when charged with the same offence against a citizen; and if the minister gave the first assault, the defendant will be excused for the subsequent battery, though he was a minister.

THE defendant is charged in the indictment, with an assault and battery committed on Don Ignatius Perorde Lima, attached to the legation of Spain, and executing the duties of Secretary of Legation. The first count states him to be a public minister of Spain, viz., a gentleman attached to the legation of Spain, and executing the duties of Secretary of Legation: the other counts are general, and state him to be a public minister. The evidence of one of the witnesses for the prosecution, stated that the defendant, a constable, had taken a domestic of De Lima, and was carrying her before a magistrate, when De Lima came up, put his hand gently on Liddle's shoulder, and inquired what was the matter; that Liddle inquired if he meant to rescue his prisoner; and immediately gave him two very severe blows with a stick, which De Lima returned.

A witness for the defendant, stated that De Lima ran to the constable, seized him violently by the breast; insisted upon his releasing the prisoner; continued his hold, though two or three times desired by Liddle to desist, who stated that the prisoner would have justice done to her, before the magistrate, where

De Lima might appear: that De Lima still continued his hold, and jostled him into the gutter, when the defendant, with a stick in his hand, gave De Lima a blow, which De Lima returned.

To prove the public character of De Lima, a certificate from the Secretary of State, dated April 1808, was read, stating that when Mr. Feronda produced to the President his credentials, as charge des affaires of Spain, he also introduced De Lima, as a gentleman attached to the legation, and performing the duties of Secretary of Legation.

Hopkinson objected, that as the assault laid and proved, was in October 1807, this certificate did not show, that, at that time, De Lima was accredited as Secretary of Legation; and that parol evidence was inadmissible to supply this defect.

[Mr. Dallas had offered himself to prove, that long before October 1807, the official character of Feronda was notorious, and that he was treated and considered by the government as minister of Spain.] Mr. Dallas read 4 Burr. 2016, to prove that the Attorney of the United States, prosecuting, was evidence of the official character of the minister, and that he was received as such by the government.

Hopkinson, contra. The introduction and acceptance of a minister, is either mentioned on the records of the Secretary of State's office, and if so, a defect in the certificate can only be supplied by the Secretary himself; or is a matter in the private recollection of the Secretary, in which case, his certificate is no more evidence than a certificate from the clerk of a Court, got given under his official seal, and in a matter where he is authorized to certify.

By the Court. The certificate of the Secretary is good evidence, and the best to prove the essential point, that he was received by our government, and accredited as the charge des affaires of Spain; and it also proves, that at the same time De Lima was presented and received as secretary attached to the legation. This is not like the case of a certificate from the clerk of a Court; for he certifies as to things respecting third

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persons. Here, the certificate of the secretary, the proper organ of the government, is an acknowledgment by the government that De Lima is received and considered as entitled to the character attributed to him; and, of course, there can be no better evidence of that fact. After this acknowledgment, parol proof of the time since which Ferenda has been considered a minister by the government, and has acted, in his official character, is proper; and this latter, in connexion with the certificate, will fix the time when the privileges of De Lima commenced.

Mr. Dallas proved, that prior to October 1807, Ferenda was treated by our government as minister, and that he was notoriously considered as entitled to that character. To prove that De Lima was to be considered as a public minister, Mr. Dallas read Vatt. 664, b. 4. c. 5. s. 55. 6 c. s. 69. 75, 76. 9 c. s. 122. 3 Burr. 1478. 4 Burr. 2017. 3 T. R. 79. Marten's Law of Nations, 250, b. 7. s. 3. 1 Dall. 111. The 22d section, cited from Vattel, states, that the secretary to the embassy is a kind of public minister, and is under the protection of the laws. Second; it is not necessary to lay in the indictment, or to prove, that the defendant knew the public character of the secretary: the Act of Congress does not require it, and such a principle would be absurd.

Barnes and Hopkinson, for defendant, contended—First; that if a foreign minister offend a citizen, the latter may oppose him without infracting the law of nations. Vatt. b. 4. s. 80. Secondly, that it is no violation of the law of nations, to assault a minister, unless the aggressor knew that he was a minister. Marten's L. of N. 236-7. Vatt. b. 4. c. 7. s. 82. 107. The Act of Congress does not punish an assault upon a minister, except where it is in violation of the law of nations: therefore, if the first assault be committed by the minister, or the battery be committed by one not knowing that the person is a minister, these authorities prove that it is not against the law of nations. Upon the evidence, it was contended, that the first assault was

committed by De Lima, and that the defendant did not know his public character. Third; that even if it appeared that De Lima was appointed by his sovereign, still a secretary of legation is not a public minister. He may be entitled to the protection of the law of nations, and yet not be a minister. Marten's L. of N. 201. The protection is not claimed by the secretary, but by the minister for him. 3 T. Rep. 79. Ward's Law of Nations, 316. 1 Dall. 117. 2 Ld. Ray. 1524. Marten's L. of N. 213. But, to entitle him to the character of secretary of legation, he must be appointed by his sovereign: if appointed by the minister, he is only a private secretary, and comes under the character of one of his domestics. In this case, the certificate of Mr. Madison, so far from stating that he produced credentials from his master, implies the contrary, by stating that fact as to the minister, and not as to the secretary. Fourth; that the indictment does not state him affirmatively to be secretary of legation, so as to be traversed; but merely that he is a gentleman attached to the legation, and performing the duties of a secretary of legation: this is too uncertain. 2 Hawk. b. 2. c. 25. s. 62. 72. 59. The second and third counts state him to be a public minister; which is an equivocal term. 4 Burr. 2016.

Mr. Dallas admitted, that if the first assault was committed by De Lima, there was no ground for the prosecution; but, on the evidence, denied the fact.

WASHINGTON, Justice, delivered the opinion of the Court. The assault and battery is fully proved, and the question is, whether the defendant has justified it, in law or fact. The attorney has very candidly admitted, what the Court intended to have stated to the jury; viz. that as to the law arising on the facts, the case stands upon the same ground as if the assault and battery had been committed on a citizen: that is, the prior assault of De Lima, if the jury should think he committed it, would excuse the battery by the defendant, whether De Lima

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were a public minister, or not entitled to that character. The whole cause, then, upon the merits, depends upon the credibility of two of the witnesses. If the one examined, on the part of the prosecution, be believed, then De Lima was guilty of no assault, and the battery cannot be justified. If, on the other hand, the witness for the defendant is believed, then the first assault was by De Lima, and your verdict should be in favour of the defendant. As to the points of law raised and discussed, it is unnecessary to give any opinion upon them to the jury. The objections, if good, appear on the indictment; and may be taken advantage of, on a motion to arrest the judgment, should the verdict find the defendant guilty.

The jury found a special verdict, that the defendant is guilty of the assault and battery as laid; that previous thereto, De Lima had been introduced to the President, (*pro ut*, Mr. Madison's certificate,) but at the time of the assault and battery laid, the defendant did not know of such introduction.

The Court afterwards gave the following opinion upon the special verdict found by the jury:—

WASHINGTON, Justice. The question reserved for the opinion of the Court, is, in effect, whether this case be within the operation of the 28th section of the Act of Congress, for the punishment of crimes against the United States; from the circumstance that Liddle did not know, at the time of the assault and battery, of which he was found guilty, that Don Ignatius De Lima was a public minister? This must depend upon the true construction of that section of the law; which, it must be admitted, is by no means free from ambiguity. It is contended, by the counsel for the defendant, that assault, battery, &c. mentioned in this section, must be so coupled with the descriptive words which immediately follow, as to qualify and restrain their meaning, to those acts when done in violation of the law of nations; and if this position be right, the conclusion also is right; since it is not to be denied, that if the aggressor be ignorant of

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improbable, that Congress could intend to make the degree of offence the criterion of jurisdiction, between the national and state tribunals. The words of the law, literally interpreted, seem to express, what we consider to have been the intention of the legislature. "If any person shall assault, strike, wound, or imprison the person of an ambassador, or other public minister," he commits an offence at common law, whether the character of the minister be known or not; and it is an offence, within this section of the law, for the purpose of giving jurisdiction to the federal Courts. These acts of violence, on account of their enormity, and being principally in the view of the legislature, are of course specifically enumerated. But, as minor acts of violence might be committed against a foreign minister, which could not be so easily foreseen or described; and it was not intended, on the one hand, to punish every possible injury to the person of a foreign minister, nor, on the other hand, to leave every other than the specified acts unpunished; the legislature, as to those not specified, seems to have thought it proper to require, that they should be such only as infringed the law of nations. But the degree of punishment to be inflicted, upon conviction, resting in the breast of the Court, the circumstances relied upon, to exclude this case from the jurisdiction of the Court, would, nevertheless, form a proper subject of consideration, in deciding what the punishment shall be. It has, in this instance, had its influence upon us.

 Hourquebie et al. vs. Girard.

HOURLQUEBIE ET AL. vs. STEPHEN GIRARD, ADMINISTRATOR
OF JOHN GIRARD.

The sentence of a foreign Court of Admiralty being full, and showing the ground of condemnation, no other part of the record need be produced.

If an agent or factor sell the goods of his principal, and has not received payment, or having received the same, invests the proceeds in property for the use of his principal, or marks and puts it away; the principal has a right thereto, and is entitled to the profits thereon, against the agent or his general creditors. *Aliter*, if the agent applies the money to his own use, and charges himself with it in account.

If two are jointly concerned in a particular adventure, the one authorized to dispose of the property, may appropriate the whole proceeds to his own use, and make himself the debtor to the other for a moiety; or he may hold the money for the joint account, and subject his associate to all the risks which may attend it.

If the connexion in a joint adventure terminate in the sale of the property, and one appropriates the proceeds to his own use, and charges himself with the proportion due to his associate in the adventure, an action on the case will lie for the part owner for his portion. *Aliter*, if the connexion does not terminate with the sale, in which case, account rendered must be brought.

If the plaintiff makes advances for another before and after his death, in an action against the executor, for money laid out and advanced for the testator, the advances made after the death of the testator, cannot be recovered.

ACTION on the case; the declaration contained a count, upon account stated, in April 1803; a count for goods sold, and the usual money counts. Pleas, payment, with leave, *non assumptis*, and fully administered. The principal items, claimed by the plaintiffs were, the sum of 26,961 francs, due by an account settled between the plaintiffs and John Girard, in April 1803, at Bordeaux; with a memorandum, stating that the plaintiffs were to

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be accountable for freights, which should be received by them from the government, on a quantity of flour, to Senegal and Cayenne; as also on other property which may be received for account of John Girard. The second item is for one half of one hundred casks of wine, shipped on board of John Girard's vessel, the Lucy, of which he was commander; the only evidence of which was an account of sales of the said wine, at Goree, dated the 11th of June 1803, and sent by John Girard to the plaintiffs, which account is headed thus: "Accounts of sales of wine, shipped in my brig, the Lucy, on joint account with Hourquebie & Brothers, agreeably to invoice, and intended for Cayenne, and other places, under my mark, 3878 dollars, one half, 1939 dollars, belonging to Hourquebies, with which I credit them." The third item of much consequence, was for money paid by the plaintiffs, for the board and education of John Girard's children; some of which became due, and was paid before, and some after the death of John Girard, which happened in October 1803.

The plaintiffs sent a commission to Bordeaux, in which the defendant joined; and each sent forward interrogatories attached to the commission. One of the plaintiffs' interrogatories required the witnesses to look upon the plaintiffs' book of entries, and to authenticate the same, and to say who made the entries. To this, all the witnesses answer: "that the plaintiffs being present, state they have no books to represent; for, if there were, the entries would only conform to the account annexed to the commission, and therefore it is unnecessary to answer the questions."

The defendant's counsel, in consequence of some agreement at the last term with the plaintiffs' counsel, when a continuance was granted the defendant, waived any objection to the commission, in consequence of this interrogatory not being answered; but they contended, that the refusal of the plaintiffs, to produce them before the commission for examination, and to enable the witnesses to answer the interrogatory, afforded a

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sufficient ground for the jury to presume, that if they had been exhibited, the entries would have shown, that the sum due, by the settled account, had been discharged, by receipts of the sums alluded to in the memoranda to that account.

Against the second item, on account of the wine, the defendant offered in evidence the record of a sentence of the Vice Admiralty Court, in February 1804, condemning the Lucy, John Girard, master, and about 4700 dollars, in gold and silver. The counsel insisted, that this specie was the result of the sales of the wine at Goree; and consequently, that the plaintiffs having thus lost their half of the proceeds of the wine, cannot now make it a debit against the defendant.

The plaintiffs' counsel objected, that on the plea of payment, notice of this defence should have been given; and besides, the record does not appear to apply to this charge; besides which, the record is not complete, the depositions taken in the case not being included in it.

By the Court. The plea being *non assumptit*, as well as payment, the state rule of practice, as to the plea of payment, is inapplicable. Second; whether the money condemned, were or were not the proceeds of the wine, is a question proper for the jury. Third; the sentence being full, and showing the ground of condemnation, and the property condemned, no other part of the proceedings are necessary to be produced.

The defendant's counsel argued, that the affair of the wine was a past transaction, and that the partnership, not being at an end at the time of the loss by capture and condemnation, and the balance being unliquidated, the plaintiff cannot recover, in this form of action, his half of those proceeds, even if his right was not lost by the condemnation, which they strongly contended it was. They cited 2 New-York T. Rep. 293. 4 Dall. 434; and the case of Lamater, a case in this Court. They insisted, that according to the regular course of such voyages, and such partnership as this was, John Girard might have invested that money in other cargoes on joint account, to a moiety of the

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profits of which the plaintiffs would have been entitled; or, if he had not so invested them, but had become bankrupt, the plaintiffs would have been entitled to his half of the proceeds, in preference to the general creditors.

The plaintiffs' counsel combatted all the points made by the defendant's counsel.

WASHINGTON, Justice, charged the jury. There are only two items in this account, which seem to be much contested. The first is the amount of the settled accounts in April 1803; and the second, the plaintiffs' moiety of the account of sales of the one hundred casks of wine, in June of that year. As to the first; it is admitted, that the 26,961 francs were due to the plaintiffs in April 1803; but it is contended, that by some means or other that debt has been satisfied, or that the jury may and ought so to presume, principally, from the circumstance of the plaintiffs not having produced their books to the commissioners, in compliance with the call of their own counsel. No proof of payments, other than what are credited, is given; nor is there any evidence to induce a suspicion of such a fact, and which those books might have cleared up. To create a presumption, some ground must first be laid. In this case none is pretended, and it is therefore too much to expect that a jury, passing upon the plea of payment, will, upon their oaths and affirmations, say, that, from this circumstance, the debt has been paid. The defendant, by his own conduct, has destroyed the very presumption which his counsel rely on. For, if it be a just inference, that the books, if produced, would show that this debt has been paid, it was in the power of the defendant to have compelled their production, or the examination of them by the commissioners. It may then, at least, be suspected, that the counsel ask you to presume what their client does not himself believe, or has not much confidence in. But you are asked to inflict upon the plaintiffs, a punishment for not producing their books at the call of their own counsel, to which

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they would not have been subjected, had they refused to produce them upon a regular notice from the defendant. For, if you presume the debt paid, on account of this circumstance, the plaintiffs will be forever barred; whereas, if the call had been made under the Act of Congress, only a nonsuit would have been the consequence.

Second; as to the proceeds of the wine. This presents three questions. First; were those proceeds lost by capture and condemnation? second; if lost, are the plaintiffs' interests involved? and, third; if not involved, still can they recover in this form of action? The first is purely a question of fact. You will follow John Girard, in the Lucy, from Bordeaux to Goree, where the wine was sold; thence to St. Vincent's; and then to Antigua, where she was condemned. Attend to the cargo he brought out with him, and the disposition of it. The defendant insists, that as the flour taken on board belonged to government, and was on freight, and it does not appear, that John Girard had any other cargo of his own, the money found on board, and condemned, must have been the proceeds of the wine. On the other hand, it is said, that John Girard might have had other cargo of his own, or might have had money of his own from other sources; and that, at all events, the evidence is too weak for you to found presumption upon. We leave you to judge of this. We have, indeed, no fixed opinion upon it; and if we had, we should think it improper to declare it.

The second point under this head, is, if the money condemned did result from the sales of the wine, are the plaintiffs to share in the loss? This is a question of law. We think it clear, that if an agent or factor sell goods consigned to him, and has not received the money, or having received it, invests it in property for the use of his principal, or marks it and puts it away as belonging to his principal, the latter has a right thereto, and is entitled to the profits made from it, for his account, either against the factor or his general creditors. On the other hand, it is equally clear, that if the factor applies the money to his own use, charging himself with the amount, in

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the same, by bringing this action for the amount thus passed to their credit.

But it is contended, that, according to the course of such a trade as the present, and the understanding of merchants respecting it, the connexion did continue, and was subsisting even at the time of the capture. It may be so; but certainly no evidence of such a custom was offered. The counsel appealed to the mercantile part of the jury, for the correctness of their statement. Should the jury undertake to act upon such a custom, we would warn them to examine well the very case before the Court, before they bring the custom to bear upon it. The question is not, whether, if two are jointly concerned in a cargo, on such a voyage as the present, and a sale be made, and the proceeds invested in other cargoes, the other joint owner is entitled to share in profits and loss; but whether, if, after a sale, the whole proceeds are taken by the owner, who, on his own account, and as agent for the other owner, made the sale, and one-half is carried to the account of the other owner, the latter can claim ulterior profits, should such be made; or will he be bound to stand by any loss which may arise? Such a custom, if it exists, strikes me as a very strange one.

The third point, under this head, depends upon the one we have just been considering. If the connexion between the plaintiffs and John Girard, terminated by the sale at Gorce, then clearly the appropriation by the latter of the plaintiffs' part of the proceeds to his own account, acquiesced in for so many years by the plaintiffs, lays a clear foundation for their recovery, in this form of action, agreeably to the principles laid down in all the cases cited at the bar. If the connexion did not terminate there, this sum cannot be recovered in this form of action. As to the sums advanced by the plaintiffs for the board and education of John Girard's children, only those sums paid before the death of John Girard, can be recovered in this action.

Verdict for plaintiffs.

Dallas and Milnor, for plaintiffs.

Ingersoll and Tilghman, for defendant.

Bradford et al. vs. Eastburn.

BRADFORD ET AL. vs. EASTBURN.

An action cannot be maintained against the agent, for transactions with his principals through him, unless a specific agreement is made with the agent, that he will be personally liable for the acts of his principal.

Where the agent has acted illegally, in refusing to deliver goods sent by his principal to him for others, upon a contract for their sale and delivery made with the principal, the remedy is by action against the principal, and not against the agent.

THIS was a special action on the case. The declaration stated, that a certain conversation was had and moved, between the plaintiffs and the defendant, concerning the importation of books and stationary by the plaintiffs, from Longman & Co. of London, for whom the defendant was agent; whereupon, in consideration that the plaintiffs had promised and agreed to receive from the defendant certain books and stationary, on their arrival, and to pay for them at the customary prices, at nine months from the day of shipping them, the defendant agreed that he would order the said books and stationary, to be imported for them from the said Longman & Co., and on their arrival in the United States, he would deliver them to the plaintiffs. That in part execution of his agreement, the defendant caused the said books and stationary to be imported for the plaintiffs; that they arrived in New-York, consigned to the defendant for the plaintiffs; and, although the plaintiffs were ready to perform, &c., yet the defendant did not deliver, &c., but refused, &c.

Plea, the general issue. The evidence on the part of the plaintiffs, was as follows, viz.: A circular letter, signed by Longman & Co., enclosed to the plaintiffs by the defendant, stating the terms on which they would send books and station-

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ary to booksellers in the United States, viz.: at the prices mentioned in a catalogue enclosed, payable at nine months from the shipping of the goods, and stating that all payments and orders were to be made through the defendant, their agent, at New-York.

On the 8th of July, 1805, the plaintiffs wrote to Longman & Co., enclosing an order for a parcel of books, which letter they sent to the defendant, with a request that he would forward it to Longman & Co.; and mentioning that they would send a duplicate by some other conveyance.

On the 11th of July, the defendant returned an answer, saying, that the plaintiffs' order should be forwarded in a few days.

On the 22d of November, the defendant, by letter, informed the plaintiffs that the goods had arrived, consigned to him, and requested that they will give their note, with an endorser, for the amount, at nine months from the date of the invoice, and give their orders respecting the goods.

The plaintiffs refused to give their note, until they should receive the invoice, and examine the goods, so as to ascertain whether they were conformable to order, and the amount was regularly calculated.

The defendant refused to deliver the invoice to the plaintiffs, until the note, with the endorser, was given; upon which the plaintiffs abandoned the goods, under a declaration that they should look to the defendant for damages.

Witnesses were examined to ascertain the damages sustained by the plaintiffs.

The Court inquired of Mr. Hallowell, for the plaintiffs, if he thought he could, upon this evidence, support his action, which was laid upon a special contract, made with the defendant; whereas it appeared that it was made with Longman & Co., and that the defendant only acted as agent?

Hallowell replied, that although the plaintiffs' letter and order were directed to Longman & Co., yet it is plain, from the

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agency of the defendant in the business, that the plaintiffs considered themselves as dealing with the defendant personally, and that he was to cause the goods to be imported for, and delivered to the plaintiffs. Upon the merits, he contended, that the condition insisted upon by the defendant, was in violation of the contract, which did not oblige the plaintiffs to give a note, much less an endorser. The plaintiffs being proved to have been a firm of credit and solidity, at the time the goods arrived, and since, the right to stop *in transitu* could not arise.

Levy, for defendant, insisted that this action would not lie against the defendant. He cited 3 P. W. 277. 2 Vernon, 221. If the factor declare his principal at the time, he is not personally liable, if he act within his authority. 1 H. Black. 364, as to the right to stop *in transitu*.

WASHINGTON, Justice. This is certainly a very plain case. If the Court could discover any difficulty in it, we would ask you to reserve the point of law, which has been raised. But there is no doubt respecting it, and of course it is our duty to say, that your verdict should be for the defendant.

As to the inconveniences stated by the plaintiffs' counsel, if agents in cases of this kind should not be liable, but persons contracting with them should be turned over to their constituents, across the water, the answer is plain. If a merchant here wishes for the responsibility of the agent, let him take the personal engagement of the agent, that the orders sent to his principal shall be complied with. If the agent refuse a personal liability, the merchant can deal with the principal or not, as he pleases. But the question here is, did the defendant enter into the agreement, charged by the declaration to have been made by him, and denied by the plea? There is no other point for you to try; for, however the plaintiffs may have been injured, still, if the defendant did not promise, as he is charged, the remedy cannot be against him. Now it appears to us, that the defendant was nothing more than a channel of communication between

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the plaintiffs and Longman & Co. The circular letter, containing the offer to furnish goods, is signed by them; and the answer of the plaintiffs, agreeing to import, is addressed, together with their orders, to them. The defendant is applied to by the plaintiffs, merely to forward their letter, which he promised to do, and which promise he performed.

The goods were not sent to the plaintiffs by Longman & Co., as they had a right to expect, but were consigned to the defendant. It is to be presumed, that the defendant acted under the direction of his principals; but if they or he acted wrong, in refusing to deliver the goods, except upon a condition not warranted by the contract, they only can be made responsible in this form of action, with whom the contract was made: this was Longman & Co., not the defendant. Your verdict, therefore, ought to be for the defendant.

Verdict for defendant.

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 Lyles vs. Styles.

LYLES vs. STYLES.

The plaintiff and the defendant were jointly concerned in an adventure to St. Domingo, which was placed under the management of the defendant, who commanded the vessel in which it was shipped, and who was to dispose of it on joint account. In a letter, addressed by the plaintiff to the defendant, before the vessel sailed, the plaintiff advised that the property should be sold for cash or produce. The defendant sold the property for bills on the French government, which, having been remitted by the plaintiff to France, were not paid.

This being a joint concern, the defendant had the power and the interest of a partner, as to the disposition of the cargo.

The joint owner might advise, but he had no right to order; and the paper addressed by him to the defendant, was to be considered as advice only.

If the conduct of the defendant was fair, in the transaction, he is not answerable to the joint owner for the loss sustained by taking the bills.

ACTION upon an account. The principal question of law arose on the following facts: The plaintiff shipped on board the defendant's vessel, which he commanded, a parcel of goods, on the joint account and risk of plaintiff and defendant, to be carried to Port Republican; where, by agreement, the same were to be sold by the defendant, for the joint account, without any charge by defendant for freight or commission. The bill of lading and invoice corresponded. It was proved, by a clerk of the plaintiff, that in order to diminish the duties to be paid at Port Republican, where the duties were then charged on the invoice, that an invoice was, by the clerk, with the consent of defendant, made out, charging the goods at half their real value. Before the defendant sailed, the plaintiff put into his hands a paper, containing his views of what should be done with the cargo, particularly advising that no part of it should be left unsold in St. Domingo; and that it should be disposed of for cash or produce. Nothing was heard of the defendant, after he sail-

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ed, for nearly a year; but certain bills, drawn at St. Domingo on the French government, were forwarded by the defendant to his wife in Philadelphia, with directions to sell them at forty per cent. discount. They could not be sold for any thing. The plaintiff received them, and after some time sent them to his correspondent in France, in order to get them paid. But they have never yet been paid.

Witnesses were examined, to prove that the French, at St. Domingo, were in the habit of seizing goods brought there, and paying for them in bills drawn on the government. The account of sales of this cargo rendered by defendant, was according to the low invoice.

It was contended, by Tod, for the plaintiff, that the defendant had misconducted himself, in selling for government bills, particularly in the face of the plaintiff's instructions; and, therefore, that the whole loss of them should fall upon him.

Gibson, for the defendant, insisted that the defendant had acted fairly, and was not liable for the loss to the plaintiff, to which he was as much exposed as the defendant; that there was good reason for believing that the goods were taken from the defendant, and the bills forced upon him; and that, at all events, the plaintiff, by receiving the bills, had waived all objection.

WASHINGTON, Justice, charged the jury. The plaintiff and defendant were jointly concerned in this adventure, and the defendant had the power and interest of a partner, as to its disposition. The letter from the plaintiff to the defendant, is improperly called a letter of instructions, or even an agreement by defendant, to sell for cash or produce. The plaintiff had a right to advise, but not to order; and such is the style of the letter. If you are of opinion that the conduct of the defendant was perfectly fair, then there is no ground upon which to charge him with the loss of these bills.

The jury, as to this part of the account, found according to the charge.

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Regularly, the master is the agent of the ship owner only, and has nothing to do with the cargo, but for its safe keeping and transportation. The supracargo represents the owner of the cargo, and has nothing to do with the ship.

The master has full powers to bind the ship owner for the money he may borrow for the necessary purposes in a foreign country, where the owner is not present, and where the loan is exclusively for the interest of the owner; and if it cannot be obtained upon bills drawn on the owner, which he is bound to pay, he may pledge the ship, to repay the loan with maritime interest.

If the owner of the ship is also owner of the cargo, the master may sell part of the cargo, to raise money for necessary wants of the ship; and, if in no other manner the money can be obtained, and the loan is absolutely required for the success of the voyage, he may sell a part of the cargo of the ship, to whomsoever it may belong.

If the owner of the cargo is on board of a vessel, at the time of a disaster requiring that money shall be obtained by the master to enable the vessel to prosecute the voyage, he is not bound to advance funds, and if he does so, he is entitled to satisfactory security, and an extra and adequate compensation for the advance.

Such contracts will, however, be at all times carefully scrutinized, as the master may be more exposed to imposition in making them, than in a loan from a stranger.

Where, in the course of a voyage, a ship from ordinary decay requires to be repaired at an immediate port, the expenses of such repairs are not the subjects of general average.

General average is incurred where the expenses or losses arose in a case of emergency, not produced by the misconduct or unskillfulness of the master, and not resulting from the ordinary circumstances of the voyage.

THIS was an appeal upon a decree entered, *pro forma*, in the District Court, upon the following proceedings, filed in that Court:

Ross vs. The Ship Active.

To, the Honourable Richard Peters, Judge of the District Court of the United States, for the Pennsylvania District. The libel of Charles Ross, of Philadelphia, merchant; respectfully sheweth:—

That the ship Active, commanded by captain Elihu E. Morris, belonging to William Davy and John B. Davy, merchants, of Philadelphia, did, on her last voyage from Canton, put into the Isle of Franco, a foreign port, in which none of her owners resided, for the purpose of procuring a fresh supply of water and provisions.

That after her arrival there, it was found that the said ship was in want of very considerable repairs, to enable her to continue her intended voyage, for which purpose the said captain was under the necessity of raising a large sum of money, and having tried, without success, various methods to procure the necessary funds to discharge the said expenses, he decided on drawing bills on his owners, and being unable to negotiate the same without an endorser, he applied to your libellant for that purpose, and proposed to your libellant, as a guarantee for the said endorsements, to mortgage and hypothecate the said ship Active, her tackle, apparel, and freight; which proposal your libellant, at the earnest request of the said captain Morris, did accede to. And in pursuance thereof, the said Elihu E. Morris, thereupon, draw two bills of exchange in favour of your libellant, both of them directed to William & John B. Davy, merchants, Philadelphia, (being the owners of the said ship Active,) both dated the 10th day of November, 1807, and payable at sixty days sight, one whereof is for the sum of 16,281 dollars, and the other for the sum of 4,884 dollars and 30 cents, which two bills your libellant then and there endorsed; and to secure the payment thereof, the said Elihu E. Morris, then and there, by an instrument of writing under his hand and seal, did hypothecate, pawn, and mortgage to your libellant, the said ship Active, her tackle, rigging, utensils, and freight, which

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Instrument, sealed with the seal of the said Elihu E. Morris, and dated November the 11th, 1807, your libellant now produces to this Honourable Court.

And your libellant further avers, that the said ship *Active*, after having been so repaired and refitted, by means of the advances procured by virtue of the said bills of exchange, proceeded on her voyage, and hath safely arrived at the port of Philadelphia; and the said two bills have been presented to the said William Davy & John B. Davy, who have refused to pay the same.

Your libellant further shows that the said bills are now become his property, he having taken up the first from Captain Thomas Skelly, who had the same, and the other being originally his property, and still continuing so.

Wherefore your libellant prays, that due proof being made of the premises, the said ship, the *Active*, her tackle, rigging, and utensils, may, by the sentence and decree of this Honourable Court, be adjudged to be sold, and that due process may issue accordingly, and that the proceeds thereof, so much as may be necessary, be paid to your libellant, in satisfaction of his said demands.

W. RAWLE, for the Libellant.

CHARLES ROSS, LIBELLANT, vs. WILLIAM DAVY & JOHN B. DAVY, RESPONDENTS.

To the Honourable Richard Peters, Esquire, Judge of the District Court of Pennsylvania. The joint answer of William Davy & John B. Davy, to the libel of Charles Ross, respectfully sheweth:—

That the respondents, being owners of the ship *Active*, Elihu E. Morris, master, let her upon freight to the libellant and Joseph Taggart, James Latimer, and Gray & Taylor, for

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a voyage from the port of Philadelphia to Canton, and back again; upon the consideration, terms, and conditions, specified in the charter party, bearing date the 29th day of July 1805, whereof a true copy is hereto annexed.

That the said libellant was constituted the supercargo as well for all the said charterers, as for sundry merchants, who shipped goods on board of the Active, under them, for the voyage aforesaid; by which the respondents were induced, able, to repose special trust and confidence in him, touching all the concerns of the ship, in the commencement, prosecution, and termination of the voyage: and particularly ably directed the said Elias R. Morris to accept the libellant's advice, on such points as their interests should be implicated in, and could be benefited by.

That the respondents, well knowing the nature and duration of such a voyage, ordered the necessary workmen, and the said shanties, to prepare the said ship at the port of Philadelphia, for the performance thereof, in the best manner; and the said ship was so fitted and prepared. And as certain supplies would inevitably be required for the return voyage, the respondents stipulated in the said charter party, that the libellant, as the agent for all the charterers, should pay a certain portion of the freight at Canton, for the purpose of defraying all the necessary expenses and supplies, port charges, and factory expenditures, for the subsequent prosecution of the voyage.

That at time of entering into the said charter party, the respondents presumed the outward adventure would consist of money, as is usual in such voyages; and in fact, the charterers, collectively, gave no notice of any other cargo, and the libellant, for his own account, only mentioned the addition of a few bales of calabats, some ginseng, and a small quantity of liquors; so that the respondents were induced to put in a full quantity of ballast: but on the eve of the ship's departure, cargo enough almost to fill the vessel was sent on

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board, the ship was detained, an unexpected expense incurred, and the voyage, from the quantity of hulling, greatly retarded.

That the said ship sailed from Philadelphia, on the said voyage, on the 13th day of August, in the year 1804, tight, staunch, and strong, and well and sufficiently fitted, furnished, manned, and provided; and arrived in safety at Wampan, on the 17th day of February, in the year 1807, where she delivered her outward cargo in good order.

That after the outward cargo was delivered as aforesaid, it became necessary to caulk the ship, overhaul her rigging, and to recruit her provisions and supplies, as is usual in all similar voyages; and the libellant being prosecuted as aforesaid, of adequate funds for that purpose, belonging to the respondents, undertook to furnish the requisite provisions and supplies, for the completion of the ship's voyage.

That the libellant, as well while he was at Canton, as since his return to Philadelphia, has represented, that he did furnish the provisions and supplies for the completion of her voyage to Philadelphia, and has actually exhibited an account of disbursements, and commissions for so doing, to the amount of about 7090 dollars.

That the libellant, pursuing the interests of the cargo in preference to the interest and convenience of the ship, prevailed on the said Elihu E. Morris to take on board a return cargo, so disproportioned to the storage of the ship, that there was not left room sufficient for the stowage of her cables and other tackle below the decks, nor for depositing a competent supply of water and provisions, in the usual places on board the vessel. But, nevertheless, she sailed from Canton, bound to Philadelphia, on the 10th of May, in the year 1807, tight, staunch, and strong, and fitted, furnished, manned, and provided for the voyage.

That the voyage having been protracted, as well by the conduct of the libellant, as by storms, calms, and adverse winds; the moon had changed before the ship departed from

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Canton, and the captain deemed it expedient to pursue the eastern passage for the Straits of Bally, on the way to Philadelphia. But, having taken in water and fresh provisions at Bally, and having passed the Straits of Bally, a slight appearance of leaking, and an apprehension of a want of water and salt provisions, (notwithstanding the recent supply, and the opportunity to procure more at Bally,) were made pretences for going to the Isle of France, by the libellant, and the said, Elihu E. Morris, acting under the libellant's persuasion and control. No sooner was the ship supplied with water and provisions, and ready again to depart from the Isle of France, than the leak aforesaid was urged by the libellant, for a general survey of the ship, for landing the cargo, and for incurring all the enormous expenses, which constitute the unjust and unnecessary foundation of the hypothecation mentioned in the libel.

That, notwithstanding the length and the vicissitudes of the voyage, and the clamours excited by the libellant touching the condition of the said ship, the cargo was landed in good order at the Isle of France; inasmuch that the libellant did himself declare, that "the cargo was delivered there in as good order as it was received; nor was there ever a China cargo delivered so free of breakage, and so free of damage of every kind, with the exception of twelve or fifteen boxes of nankeens, which were between decks." The repairs, actually necessary, were also found to be trifling; and, in truth, the ship departed from the Isle of France, after the expense had been incurred, as valuable then as before. That, in order to discharge the debts thus unnecessarily incurred, the said captain Elihu E. Morris proposed to sell a part of the cargo, which might have been thus collected without a sacrifice; but the libellant resisted the sale, and declared that he would formally protest against any attempt to make it; whereupon the said captain Morris was induced to withdraw the advertisements he had made for that purpose, and to abandon the sale altogether.

That the libellant, with a view, as it would seem, to his own

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Benefit and emolument, did, himself, negotiate and obtain, in the name of the said Elihu E. Morris, a loan of a sum of money of at least double the amount actually expended, from a certain captain William Waters, then being at the Isle of France, for a premium (as it has been alleged) of ten per cent.; and did thereupon represent to the said captain Elihu E. Morris, that bills of exchange must be drawn on the respondents for the amount of the loan and premium, which he, the libellant, was required by the said captain Waters to endorse.

That the libellant, having effected the said loan as aforesaid, demanded from the said Elihu E. Morris, a premium of thirty per cent. for endorsing the said bills; and also an hypothecation of the ship, cargo, freight and insurance; against which demand the said Elihu E. Morris remonstrated; but at length, under the persuasion and control of the libellant, complied.

By these operations, it will appear, that the sum actually expended for repairs and supplies, amounted to only 16,304 dollars and 42 cents, including a commission of five per cent.; that, in order to provide for the payment of that debt, a sum exceeding 28,000 dollars was obtained by the libellant, as aforesaid, from captain Waters; but for the difference between the two sums, no account has been rendered, nor any allowance made to the respondents; that a premium of ten per cent. has been charged in favour of captain Waters, on the gross sum obtained from him; for the amount of which, added to the sum actually expended, making 16,721 dollars, one of the bills of exchange in the said libel mentioned was drawn; and that a premium of thirty per cent. has been charged on the said sum of 16,721 dollars, in favour of the libellant, on account merely of his endorsement, making the sum of 4,884 dollars and 30 cents, for which the other bill of exchange in the libel mentioned was drawn.

That the ship sailed from the Isle of France, on the 15th day of November, in the year 1807, upon her return voyage, still carrying her cables, during a great part of the voyage; upon

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deck, for the accommodation of the cargo, and arrived at the port of Philadelphia, on the 4th of March, 1808; when the said libellant, under colour of the said hypothecation, and also pretending that the expenses aforesaid, at the Isle of France, did not constitute a claim of general average, forbade the charterers to settle and pay the freight-money, according to the terms of the charter party; in consequence whereof, the cargo remained on board of the said ship, at a great expense and hazard, until the 31st of the same month, March; upon which day, and on subsequent days, the whole of the cargo (consisting of nearly eight thousand packages) was landed in perfect order at the port of Philadelphia, and the voyage concluded, without loss or injury to the outward and homeward cargoes, by default of the ship, or of the respondents, at any part of the voyage.

And the respondents, further answering, say, that true it is, as the libel alleges, that the said captain Elihu E. Morris did draw upon them the two bills of exchange in the said libel mentioned, which they have refused to accept, and do not mean to pay, because they do not think themselves bound in law or justice to do so; the said bills having been unnecessarily and improperly drawn, without their authority, knowledge, or approbation. And the respondents further admit, that the said captain Elihu E. Morris did execute an instrument in writing of the date specified in said libel, purporting to be a mortgage or hypothecation to the libellant, of the ship Active, her tackle, rigging, utensils, and freight, the cargo of the said ship, and the insurance on the said ship, freight, and cargo; which these respondents believe to be the same instrument in the said libel referred to.

But the respondents, further answering, aver, and offer to prove:—

1. That the expenses incurred for the repairs and equipments of the said ship Active, at the Isle of France, were incurred at the instance, and by the procurement, and owing to the negligence and wrong of the libellant, without necessity, or just and

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sufficient cause to charge the respondents therewith, by hypothecation or otherwise.

2. That, as well the libellant as the said captain Elihu E. Morris, was in possession of funds belonging to the owners of the ship, freight, cargo, and insurance, adequate to defray all the necessary expenses of the ship, her repairs and supplies, upon the voyage, without resorting to any loan or loans of money.

3. That if it had been necessary to raise money by loan, for defraying the expenses of the ship, her repairs and supplies, during the said voyage, the same might have been obtained upon a moderate premium, upon the security of the ship and freight.

4. That the libellant did not lend or advance the whole or any part of the money, for which the alleged hypothecation was given.

5. That the said libellant, being one of the charterers, being supracargo for most of the shippers, and being a part owner of the cargo, on the spot at the time when the expenses were incurred, could not rightfully demand or receive the said premium and alleged hypothecation; nor could the said captain Elihu E. Morris rightfully grant the same to the libellant.

6. That any expenses necessarily incurred for repairs and supplies, or on account of damage and detention of the ship at the Isle of France, constitute a claim for general average; and the proportion thereof due from the libellant ought to be allowed and paid to the respondents.

And the respondents respectfully pray, that the Honourable Court, in consideration of the premises, will dismiss the said libel, with costs.

The Replication of Charles Ross, libellant, to the answer of William Davy and John B. Davy, respondents.

This libellant, saving and reserving all and all manner of benefit of exceptions to the manifest errors, uncertainties, and

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imperfections, in the said answer contained, for reply thereto, or to so much thereof as it is material for him to reply to, replieth—

That by any thing in the said answer contained, he ought not to be precluded from having and maintaining his libel aforesaid, according to the prayer thereof, because, he saith; that all and singular the matters and things in his said libel contained and set forth, are just and true. Without that, that the said ship Active's putting into the Isle of France, on her said return voyage, was occasioned, or the expenses for her repairs or equipments there, were incurred, by or at this libellant's instance, procurement, negligence, or wrong; or that this libellant, or the said captain Morris, were in possession of funds applicable or adequate to defray the necessary repairs, expenses, and supplies of the said ship, at the Isle of France, without adopting the measures in this libellant's libel set forth; or that the loan in the said libel set forth could have been obtained at a less premium; or that this libellant could not, as in his libel he hath set forth, lawfully receive the said hypothecation; or that such repairs constitute a general average, in preclusion of this libellant's right of recovering on the said hypothecation; or that any other matter or thing in the said answer contained is true, or sufficient to bar his said demand.

Wherefore he prays, as in his libel he before hath prayed.

W. RAWLE, *for the Libellant.*

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It is agreed, that it be submitted to the Court to decide, whether the libellant, by endorsing the bills mentioned in the hypothecation, did an act which, under all the circumstances, he was not bound to do without a compensation, and thereby rendered any service to the respondents?

If the Court shall be of opinion in the affirmative, it is agreed that the question of compensation shall be settled by them—

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The Court to say, whether the libellant be entitled to the whole, or what part.

W. RAWLE, for Libellant.

A. J. DALLAS, for Respondents.

April 29th, 1808.

WASHINGTON, Justice, delivered the opinion of the Court. The agreement of the parties has left but two questions for the Court to decide. First; whether the libellant was or was not bound, under all the circumstances of this case, to endorse the bills of captain Morris, for securing which, the hypothecation was given, without compensation, and thereby render a service to the respondent; and if not so obliged, the amount of compensation to which he is entitled. Second; whether the expenses incurred by the vessel at the Isle of France, must be borne by the vessel, or are to be considered as a subject of general average. This agreement will render it unnecessary for the Court to consider the objections made to, the form of the hypothecation, and the right of the libellant to recover maritime interest, in virtue of that instrument. Regularly, the master is the agent of the ship owner only, and has nothing to do with the cargo, but in relation to its safe custody and transportation. The *supracargo*, on the other hand, if there be one on board, represents exclusively the owner of the cargo, acts under his authority, and is a stranger, as to what concerns the ship or its owner. The powers of the master, in relation to his employer, are always considerable; and in no instance more important, than in that of binding his owners, and their property, by his contracts for money borrowed in foreign parts, for the necessary purposes of the voyage. To prevent, as much as possible, the injuries which may result to the owners, by the improvident exercise of this power, the ordinances of foreign countries, and the rules of our own Courts, have imposed every

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restraint upon the master, which the reason and nature of the case demand. The contract must not only be fair in itself, but it must be made in a foreign country, where there is no owner, and under such circumstances of necessity, as show that it was entered into with a view to the interest of the owner. The master is bound to raise the money by means the least injurious to those he represents. If his owners are known, and have credit in the place where the money is wanted, he should, in the first place, endeavour to raise it by drawing bills upon them, which they are bound to accept and pay. If the money cannot be obtained in this way, his next recourse is to the property of his owner, which he may pledge for the security of the lender; and, by way of inducement to the person disposed to assist him, he may bind the property, upon its safe arrival, to compensate the loan by the payment of an extraordinary premium, beyond the legal rate of interest. If the owner of the ship be also owner or part owner of the cargo, the master may, in his discretion, sell a part of the cargo, in preference to borrowing at an exorbitant rate of premiums; and, in his choice of means, his judgment, fairly exercised, must govern him. If, in none of these ways he can supply his wants, he may then go beyond the general scope of his authority as master, and may sell a part of the cargo, or hypothecate the whole. This extraordinary power, in relation to those whose interest he does not represent, is cast or forced upon him, in the language of Sir William Scott, by the extreme necessity of his situation. It may, we think, be derived from a tacit agreement of the owner of the cargo, to prevent the voyage, in which he is equally interested with the owner of the ship, from being broken up, or unreasonably delayed. But, at all events, the necessity must be such as to connect the act with the success of the voyage; and not for the exclusive interest of the ship owner. Thus far, with respect to the powers of the master.

It is said, that by an article of the *Consolato del Mare*, the merchant, if he be present, and has money, is obliged to ad-

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vance it for the necessities of the voyage; and hence it is inferred, that if he has credit instead of money, he is bound to use the former for procuring the latter. We do not know that this provision is to be met with in the Laws of Oleron, or in any other foreign ordinance; and it is to be observed, that the above article is silent as to the terms and conditions upon which the advance is to be made. There can be very little doubt, upon the reason of the case, as to the occasion when this obligation upon the merchant arises. If the master is unable to raise the money by any of the means before mentioned, and without it is unable to prosecute the voyage, the obligation of the merchant to advance becomes imperious. But this duty results from a circumstance which is intimately connected with his own interest, as well as with the interest of the ship owner. Even then he may refuse to lend, and leave the master to his extraordinary power of selling a part of the cargo; because it may be his interest that this latter course should be pursued. But, if the question merely be, which mode is most for the interest of the ship owner, we must hesitate in yielding our assent to the proposition, that the merchant is under any obligation to act in the way which is best calculated to promote exclusively the interest of the ship owner. Suppose, for example, it should be in the power of the master to borrow money upon the security of the vessel, but at a high premium; and that by selling part of the cargo, a loss would result to the ship owner, equal to such extraordinary premium; will it be contended, that in such cases, the merchant, or his representative on board, would be obliged to advance his money or credit, to relieve the owner of the ship from this loss? What reason or justice is there in imposing such a duty upon him? He is under no other obligations to the ship owner, than such as the contract between them imposes. The one engages to carry the goods of the other safely to their destined port; for which he is to receive a stipulated compensation. There are no intermediate duties created, but

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such as are occasioned by a common danger and a common interest, resulting from the perils of the voyage.

But if the voyage may be prosecuted, the owner of the vessel cannot excuse himself for not doing so, because the merchant refuses him facilities within his power, and which he is at perfect liberty to grant or to withhold.

Should a merchant be found so perversely blind to his own interest, and so churlishly disposed in relation to the carrier of his property, as to hazard the success of the voyage, by refusing his aid in a case of such extreme necessity, we will not say how this conduct might affect any claim which he might have against the carrier, upon the contract of affreightment; neither will we say how it might affect his claim against the ship owner, for the value of the goods which the master had been obliged to sacrifice for the want of the money or credit, which it was in the power of the merchant to lend. These are extreme cases, which are not now to be considered. But it is decidedly the opinion of the Court, that the merchant is under no obligation to advance his money or credit, with a view merely to benefit the ship owner; and in no instance is he bound so to do, but upon condition of receiving a reasonable compensation. If he may demand a compensation for the loan, he may, *a fortiori*, demand satisfactory security for repayment of his advances.

But, whilst we admit the validity of these marine contracts between the master and the merchant, or his representative, they will always be looked at with a greater degree of suspicion, than where the lender is a stranger to the parties. The merchant is better informed than a stranger, as to the personal responsibility of the ship owner, and the risk which he runs; the influence which he may possibly have over the other contracting party, will in general warrant the apprehension, that better terms have been obtained from the master than were strictly fair. In the particular case before us, every thing appears to be fair, and there is no cause to impeach the correctness of the libellant's conduct in relation to this negotiation.

But, in general, the Court would feel itself called upon to hold a strict hand over contracts of this description, entered into with the owner of a cargo in a foreign country; and to scrutinize, with great exactness, the circumstances which led to the contract, and which ought to affect the stipulated compensation.

This leads to the consideration of the premium claimed by the libellant, for his endorsements of captain Morris's bills, and the compensation to which he is justly and equitably entitled. It is in full proof, that every effort was made by captain Morris to obtain the money he wanted, previous to the contract entered into with the libellant. The respondents, being probably less known at this part of the Isle of France than they are in other parts of the world, and the difficulty of effecting an insurance on the risk which the lender was to run, rendered it impracticable to borrow money on almost any terms. Part of the cargo might have been sold, but upon the most ruinous terms for the owners of the ship. The plan ultimately adopted, was considered to be most to the advantage of the respondents, and in this opinion we concur. But it does not follow, from the admission of these facts, that the claim of the libellant to a compensation, equal or nearly equal to the sum which the respondents must have paid, by the adoption of other means of raising the money in the power of the master, is founded in equitable principles. The high premium claimed by persons residing in the island, arose from the scarcity of money, their ignorance of the solidity of the owners, and the hazards which attended any security which could be given. Whereas, the libellant was acquainted with the owners, resided in the same city with them, and besides, would, upon the safe arrival of the vessel, have in his hands a much larger amount than that for which he was to become responsible. Captain Waters lent this very money, at a premium of ten per cent. upon the security of the libellant, and perhaps upon the additional security of the hypothecation. Did not the libellant lend his credit upon a security

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equally sufficient? As to captain Waters, however, it is to be considered that he was under the pressure of a certain necessity to get this money to the United States; and, in addition to his ten per cent., he received, by means of this negotiation, a compensation in the saving of the freight of his specie, if indeed, on any terms, he could have got it away. Mr. Adgate proves, that he had received fourteen per cent. for approved bills with good endorsers. Mr. Ashmead mentioned, that he had received for money from twenty to fifty-five per cent., secured by bills on Philadelphia.

Upon the whole, we are of opinion, that, under all the circumstances of this case, a premium of fifteen per cent. will be a liberal compensation to the libellant for his endorsement, exclusive of that which the master was compelled to pay to captain Waters for the loan.

The next question is, are the expenses incurred at the Isle of France, to be considered as a subject of general or partial average? The great and leading rule, respecting this subject, is, that all persons benefited by an act of the master, with a view to the general safety of all, in case of extraordinary necessity or peril, must contribute to the loss, in proportion to the property saved by the act. The act must not only be performed with this view, but it must be in a case of emergency, not produced by the misconduct or unskillfulness of the master, or commander, and not resulting from the ordinary circumstances of the voyage: as, if goods be thrown overboard in a storm, in order to lighten the vessel, and insure her safety; if injuries be done to the vessel for a similar purpose, or expenses be incurred in repairing a damage done to the vessel, by the violence of the winds, to avoid the pursuit of enemies, or pirates, and in many other cases of the like nature. But if the damages to the ship arise from the ordinary occurrences of the voyage, and not from some extraordinary violence or peril, to which she has been exposed, the loss must be borne by the owner of the vessel, who engages, by his contract with the freighter, that she shall be

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stout, staunch, and strong, and properly equipped for the voyage; and whether it be expressly stipulated or not, he is bound to keep the vessel in this condition, during the voyage, unless prevented by some extraordinary peril, for which he can, in no respect, be responsible.

In this case, the Active left Philadelphia on her outward voyage, well equipped, and, in our opinion, perfectly seaworthy. We think, also, that she was seaworthy at the time she left Wampoa on her return. Though a sound vessel at the time of her sailing from Philadelphia, she was, nevertheless, old, and upon so long a voyage as this generally is, rendered unusually so in this case by adverse winds, and the advanced season when she left Wampoa, the injury sustained in her bends, and the loss of her copper, appear to have resulted from a gradual and an ordinary decay, and not from any violent winds to which she was exposed on her outward or homeward voyage. That the owners have been subjected to a very heavy, and perhaps unnecessary expense, by the proceedings of the tribunal at the Isle of France, seems highly probable, and is much to be lamented. But surely this is not imputable to the libellant; who would have transgressed the limits of his duty by interfering, and who might have exposed himself to censure, if not to responsibility, had he interfered, and an accident had befallen the ship. Upon this point, therefore, we are of opinion, that the expenses incurred by the ship at the Isle of France, are not properly a subject of general average.

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Action on a policy of insurance, dated the 27th of June 1807, on goods on board the *Little William*, from Philadelphia to Tonningen, or Hamburg, if not blockaded; warranted American property, proof to be made here. The captain was instructed, "If you can ascertain and obtain permission to go to Hamburg, from the cruising vessel at the entrance of the Eyder, you will proceed; but on no account attempt it, unless you are well assured that the blockade of the Elbe is raised." The vessel was captured by a British cruiser, six hundred miles from Tonningen, and was condemned. The captain did not deliver his letter of instructions to the captors, until some days after he had delivered the ship's papers. The vessel and cargo were condemned by Sir William Scott, as enemy's property.

The stipulation in the policy, as to the place where proof is to be made in support of the warranty, is not set aside by the sentence of a foreign Court against the neutrality, but the same may be vindicated here, notwithstanding such sentence.

The instructions of the owner, under which the master of a vessel, sailing to a port known to be blockaded, is directed to govern himself by information to be obtained at the mouth of the blockaded port, justify suspicions of an intention to violate the blockade; but these should cease, when it is manifest that the conduct of the captain was legal and fair.

If the instructions to the master violated any of the rules established in the Court of Admiralty of England, although such rules were against the laws of nations, the instructions should have been communicated to the underwriters.

The instructions of the plaintiff to the master, did not violate any of these rules, the vessel being destined to Tonningen, unless she should obtain permission at the entrance of a place not blockaded, to proceed to Hamburg.

The conduct of the captain, in not delivering the letter of instructions when captured, was imprudent; but was not such as should affect the assured.

THE policy in question, was effected on the 27th of June, 1807, on goods, the property of the plaintiff, an American citi-

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zen, on board the *Little William*, belonging to Jacob Sperry, also an American citizen, at and from Philadelphia to Tonningen, or Hamburg, if not blockaded; warranted American property, proof whereof to be made here. She sailed on the voyage insured, on the 3d of July 1807. On the 30th of June, the owner of the vessel, who was also the agent of the plaintiff, wrote a letter of instructions to his captain, in which he directs him "to proceed to Tonningen, and on arrival, to forward, by express, his letters to Mr. Vogell of Hamburg, to whom, (he says) you are consigned, and under whose care you will place yourself. If you can ascertain and obtain permission to go to Hamburg from the cruising vessels at the entrance of the Eyder, you will proceed; but on no account attempt it, unless you are well assured that the blockade of the Elbe is raised."

On the 31st of July, the *Little William* was captured in the British Channel, six leagues to the southward of Stare Point, and carried into Plymouth. The captain delivered to the captors all his papers, except the letter of instructions, and so stated in answer to one of the standing interrogatories; but it was afterwards given up, and was made use of in the cause. It appeared in evidence, that the place of capture was about six hundred miles from Tonningen: that Heligoland, a small island in the North Sea, inhabited by fishermen and pilots, belonging to Denmark, where there is a light-house, kept at the expense of the Hamburgers, is nineteen miles from the mouth of the Elbe, and twenty from the mouth of the Eyder: that it is the dividing point, where all vessels destined to either of those rivers, or to the Weser, stop to take a pilot; and one of the witnesses said, that it is considered as being at the mouth of the Eyder: that Hamburg is about fifty-six miles from Cruxhaven, and this about twenty-five above the mouth of the Elbe: that the mouths of the Elbe and Eyder are about twenty miles apart; and that during the blockade, goods were permitted to be carried along shore from Hamburg to Tonningen; and sometimes they were carried over land from Hamburg to

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Tonningen, about eighty miles: that cruising vessels, not forming the blockading squadron, were frequently met with to the westward and southward of Heligoland, and sometimes to the eastward. The captain, upon his examination before the High Court of Admiralty, stated his destination, as mentioned in his letter of instructions, and that he intended to obtain information, whether the blockade was raised at Heligoland, and there to determine as to the course he should take; but on no account to go to the Elbe, unless he should there understand that the blockade was raised. It also appeared by the depositions of Vogell and a Mr. Sperry, at Hamburg, that they received letters from Jacob Sperry, apprizing them of this shipment; that the vessel was to go to Tonningen, unless the blockade of the Elbe was raised, and directing them to prepare a return cargo. That in consequence of these letters, they sent forward a cargo from Hamburg to Tonningen, and were afterwards obliged to ship it in another vessel, having heard of the capture of the *Little William*. There were many shippers of the cargo sent out in this vessel, and by all the bills of lading and invoices, it appeared that the destination was to Tonningen. The ship herself, and part of Jacob Sperry's cargo, were not insured.

On the 23d of November, the ship and cargo were condemned; generally, as enemy's property. On the 12th of November, a regular abandonment was made and refused.

The defendants' counsel offered to read the deposition of a clerk of one of the proctors in the Court of Admiralty, concerned in the cause there, in order to show what were the grounds assigned by Sir W. Scott, in delivering his opinion for the sentence of condemnation. This was at first opposed, but at length consented to by the plaintiff's counsel. The ground assigned was, that an American vessel, sailing to a port known to be blockaded, ought to inquire at some English or neutral port, whether the blockade is still subsisting, and not to do so from the blockading squadron at the mouth of the

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river so invested. That, in this case, the instructions confined the captain to inquiries to be made of the cruising vessel, (in the singular,) at the mouth of the Eyder, which must mean the northernmost of the vessels forming the blockade. Of course, this amounted to a breach of the blockade. In the copy of the letter of instructions, appearing on the record of the proceedings, this word is written *vessel*. In the copy-book of Jacob Sperry, it is written *vessels*, in the plural, and his clerk stated that he copied the letter truly.

It was objected, by the defendants, to the recovery, first; that the sentence of the Court of Admiralty, condemning this property for a breach of blockade, was conclusive; and that the clause added to the warranty of neutrality, that proof was to be made here, only applied to the property being neutral, but not to collateral points, such as the not conducting as a neutral. Secondly; that the sailing with a knowledge of the blockade, under instructions to ask permission and obtain information of the blockading squadron, was, according to the law of nations, a breach of blockade; that it appeared by the evidence in the cause, that the information was to be obtained from the blockading squadron. Thirdly; that the letter of instructions was material to the risk, and ought to have been communicated. Heligoland, the dividing point, is at the mouth of the Eyder, and so near to the Elbe, that it would of course be the place, about or near to which the blockading squadron would be. There, then, the inquiry was to be made. It was necessarily to be made of the vessels forming the blockade, because none others could grant permission to enter the Elbe. These two facts, then, bring the case precisely within the principles laid down by Sir W. Scott, in the cases of the *Betsey*, and that of the *Posten*, decided in 1799, and that of the *Spea* and *Irene*, decided in 1804. These cases were, or ought to have been known to the insured; and, therefore, his letter of instructions, exposing the property to this peril, ought to have been communicated. On the subject of concealment, was cited 7 T.

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Rep. 162. Fourthly; the conduct of the captain, in omitting to surrender his letter of instructions to the captors, increased the danger of confiscation, for which the insured is liable. 9 Rob. Rep. 28. 3 *Idem*, 153. 143.

To prove that parol evidence, to explain the ground of condemnation, was cited, Dougl. 554. 2 Dall. 272. 7 T. Rep. 527. *Dederer vs. The Delaware Insurance Company*, in this Court.

For the plaintiff, it was argued, that the destination of this vessel, under all the circumstances of the case, did not amount to a breach of blockade. Vattel, b. 3. c. 7. s. 117. Intention to break a blockade, without an attempt, is not sufficient. *Fitzsimmons vs. Newport Insurance Company*, in the Supreme Court of the United States. Sailing to a blockaded port, knowing it to be so, is not a breach. 3 N. Y. T. Rep. 235. 5 Rob. Rep. 75.

The instructions, it was contended, were not material; because, in this case, the inquiry was not to be made of the blockading squadron at the mouth of the Elbe, but was to be made at the mouth of the Eyder.

As to the conduct of the captain, this was not a ground of condemnation.

The Court stopped the counsel, as to the conclusiveness of the foreign sentence, observing, that they adhered to what was said in the case of *Calbreath vs. Gracy*. The stipulation, as to the form in which the proof is to be made, is co-extensive with the warranty of neutrality.

WASHINGTON, Justice, charged the jury. For the satisfaction of the parties, and particularly of the one against whom the Court will decide, it may be proper to observe, that in few instances have we seen a case where either party was more excusable for coming into a Court of justice, than the present. The Court has felt extreme doubt upon one of the points, and our opinion, which is now settled, has wavered considerably, during the very able discussion which we have heard.

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Whether the decisions of Sir W. Scott, as given in the cases cited from Robinson, are, to the extent to which they are contended to go, agreeable to the law of nations, may well be doubted; there is, in our opinion, less room to doubt as to the application of those principles to the case now under consideration. As a rule of evidence, there can be no reasonable objection to the doctrine laid down in this case. It certainly is a very suspicious circumstance, that a neutral vessel, even though it be an American, should sail upon a destination to a port known to be blockaded, with instructions, or with a known intention to be governed, as to her ulterior progress to that port, by the information she might obtain at the mouth of the river, from the vessels forming the investment. It might well be said, that your coming here to ask a foolish question, or to solicit a permission so unlikely to be granted, is strong evidence that you meant to go in, if time and opportunity had offered. But to consider that as an actual breach of blockade, which is only evidence of an intention to commit a breach, seems to extend a mere measure of precaution and of preventive legal policy, (as the Judge expresses himself in one of the cases cited,) beyond the necessity which created the rule. In this case, the light of heaven was not more clear, than the honest neutral destination of this vessel, and of course this Court must say, that the foreign Court was not warranted in pronouncing that her conduct amounted, really or technically, to a breach of the blockade of Hamburg. Indeed, we have the authority of Sir W. Scott himself for this opinion. In the case of the *Betsy*, decided in May 1799, her destination was to Amsterdam, a port known to be blockaded before she left America; and the instructions were to go to Hamburg, if she should not be so fortunate as to get into Amsterdam, owing to the English ships still keeping up the blockade, which, it is said, "you will know by speaking those which lie off." This was as strong a case as could well have occurred for the application of the rule, and

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yet, in consideration of the fairness of the transaction, appearing from other evidence, she was acquitted.

In the present case, it is obvious that the Judge was entirely influenced by the circumstance, that the inquiry was to be made, and the permission obtained, from the cruising vessel at the entrance of the Eyder, which he construed to mean one of the blockading squadron. But, if this had been the meaning, we cannot conceive how this decision is to be reconciled with that just quoted. Whether the expression in the original letter was "vessel," or "vessels," may properly be left to the jury to decide, upon the evidence; but, even if it were the former, we think it obvious that the latter was intended, from the manifest absurdity of pointing to a particular vessel, of which it was impossible the American owner could have had any knowledge. Upon this point, therefore, we are of opinion, that the warranty of neutrality was not falsified.

The important, and by far the most difficult question, still remains to be considered. Did the letter of instructions expose the property to a risk not contemplated by the policy? If it did, and if it was material in your opinion, then the policy is void. In this point of view, it is immaterial whether the decisions of Sir W. Scott, in 1799 and 1804, were consistent with the law of nations, or not. If not so, still the danger of capture, and loss was as certain, as if the rule laid down had been in all respects correct. What was this risk?—That a vessel, destined to a blockaded port, known before her sailing to be blockaded, with instructions to go elsewhere, only in the case of her being turned away by the blockading squadron when on their station, is considered as guilty of a breach of blockade, and subject to confiscation. This rule was known to the insured and to the underwriters, or ought to have been known to them; but whether the vessel was placed in a situation, where the rule would apply, was known only to the insured. It is in vain for the insured to say, that he mistook the meaning of those decisions, or that he did not suppose the instructions were at all material

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to be known by the underwriters. If the case were even doubtful, it was his duty to give to the other contracting party, equally with himself, an opportunity of judging. If he has acted wrong, though without intention, and is of course innocent on a moral point of view, so are the underwriters; and the rule is clear, that if one of two innocent persons must suffer a loss, he who has occasioned the loss must bear it.

- The question then is, did this letter expose the property to the risk, of which both parties are presumed to be apprized. Let it be supposed that the author of this letter, at the time he wrote it, had Sir W. Scott's decisions before him. In the case of the Betsey, he would discover, that an American vessel, destined to a blockaded port, known before she sailed to be in that situation, and with directions to make inquiries of the blockading squadron lying off, was acquitted. This of course would excite no alarm.

In the case of the Posten, Hyll, he would discover, not only that she was a European vessel, and in this respect less favoured than an American vessel, but that her destination was to a blockaded port, and that she was to receive information from the blockading squadron on that destination. He would of course think it not prudent, to give such directions to the captain of his vessel.

Looking upon the case of the Spes and Irene, he would observe that these too were European vessels; that the owners knew of the blockade of the Elbe, yet instructed their captains to continue their course to Hamburg, till they should be warned, and turned away.

With these cases before him, what were the orders given, in this case, by the owner of this vessel?—To proceed to Fionnigen, a port not blockaded; but in case the captain could ascertain and obtain permission to go to Hamburg, he was in that case to go there. From whom, then, was he to obtain information and permission? The answer is obvious—~~permission~~ from some of the blockading squadron, in case he should meet

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with any at the entrance into the Eyder—*information* from any other cruiser in the same place, provided none of the blockading squadron should be there. Where was the information and permission to be obtained?—at the mouth of the Eyder. But, to constitute this offence, according to the decisions I have alluded to, it was not sufficient, that the inquiries should be made of the blockading squadron, but it must have been at the mouth of the river; for it is clear, that if they had been met with at a distance from their station, there was no objection to the inquiry being then made. But in this case, it was to be made of them, or of any other cruisers, not at the mouth of the Elbe, the invested river, but at the mouth of the Eyder, which was not invested, and where it was lawful for this vessel to go. The difficulty which weighed with the Court, for a considerable time, was produced by the evidence of one of the witnesses, who stated that Heligoland was considered as at the mouth of the Eyder; which seemed to produce some doubt, at least, whether, if the inquiry was to be made of one of the blockading squadron, at a place considered to be the mouth of the Elbe, as well as of the Eyder, the case was not within the principle laid down in 1804. But, when the geographical situation of these places is considered—that Heligoland is in the direct and legitimate course to Tonningen, and that from that spot the courses to the two rivers diverge; that, in point of fact, this little island is twenty miles distant from the real junction of the Eyder and the Elbe, with the sea; and that the expression is not, that the information is to be obtained at the mouth of the Elbe, or even at Heligoland, but expressly at the entrance of the Eyder—it is plain, that the intention was, that she should look out for some vessel to the eastward of Heligoland, and in a course which she was permitted to pursue, and different from that which would have led her to the mouth of the Elbe. If the blockading squadron had discovered her pursuing that course, it would have been obvious, that she was not intending, or in a situation to bring herself within the letter or the meaning of the rules

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laid down by Sir W. Scott. Had her course been towards the mouth of the Elbe, the case would have been different. Upon this point, therefore, we are of opinion that the letter of instructions did not violate any decisions in England, prior to this insurance.

As to the conduct of the captain, although certainly imprudent, yet it was not such as ought to affect the insured. This was not, in the slightest degree, relied upon by the Court, as contributing to the condemnation of the property. It is incidentally glanced at by the Judge, more in the spirit of admonition, than of severe censure.

Verdict for plaintiff.

Levy, Jared Ingersoll, and Charles J. Ingersoll, for plaintiff.
Rawle, Condry, and Tilghman, for defendants.

Jaffray vs. Dennis.

JAFFRAY vs. DENNIS.

To prove the rate of interest allowed in any one of the states of the United States, the law of the state must be produced.

The rate of interest fixed by the law of Georgia, the contract having been made there, will be allowed in the Courts of the United States, although it may exceed the rate authorized by the law of the state, in which the Circuit Court holds its sessions.

THIS was an action on an account, contracted and settled in Savannah. The plaintiff's counsel claimed eight per centum as the legal interest of Georgia; which rate of interest he proved by a witness.

The Court informed the counsel, that he must produce the law of Georgia, if he claimed higher interest than is allowed here. In the several states of the Union, the rate of interest is regulated by law; and therefore, any other species of evidence than the law itself, is inadmissible. It is otherwise as to foreign countries, where the rate of interest is regulated by custom.

The jury, however, may find six per centum; and upon examining the law, if it can be procured, we can make an addition, if the Georgia interest be higher, provided both parties agree.

This was agreed to.

Verdict at the rate of six per centum.

The law of Georgia was afterwards produced; and the Court increased the judgment by the addition of the two per cent.

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neither in the policy or memorandum, is she protected back from any other place but Aruba. But, if this argument be sound, I would ask, what part of the policy protects her from Coro to Aruba? The permission to go to Coro, would cover her voyage thither; but there are no words which extend this protection to her voyage back to Aruba. This construction, then, instead of fulfilling, would manifestly violate, the meaning of the parties; which, I admit, was to cover her throughout. The only way to effect this, is to consider Coro, substituted by the memorandum as the termination of the outward voyage, instead of Aruba, which was in the first instance the ultimate point; and then the insurance will be, at and from Kingston to Aruba, and at and from thence to Coro, and at and from thence back to Kingston. But, if the plaintiff's exposition be admitted, we must go on, and add a new voyage, not expressed in the policy or memorandum, and by no means essential to the meaning of the parties as expressed. Had she gone to Coro without the permission, she would have committed a deviation, and the underwriters would have been discharged; but now, she is permitted to go there, so as not to prejudice the policy, the intention of which was, to cover the whole voyage. But it does not follow from this, that the insured should, though not at all necessary, and perhaps very inconvenient to him, stop at Aruba; for no other purpose than to take his departure from thence. This could not have been the intention. As to stopping at Rio de la Hache, if the construction I have given be correct, then the vessel might as safely touch there from Coro, as from Aruba.

The evidence given by the jurymen, is very far from proving a usage of trade. Twenty instances may have occurred, of vessels, not being otherwise provided with persons acquainted with the traffic in mules on the Main, calling there to obtain such a person; and as many instances may have occurred, of vessels proceeding with a supracargo, brought from the port of

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the vessel's departure, relying upon finding such a character at Cero. But this is no proof of a usage. It should appear that this course is uniformly pursued, and that it should be known as well to the underwriters as to the insured. The former must take notice of the usage of trade, but then it must be uniform and fixed. There appears, upon the whole, to have been a deviation.

Verdict for defendants.

Lessee of Milligan vs. Dickson et al.

LESSEE OF MILLIGAN vs. DICKSON ET AL.

Ejectment.—The plaintiff claimed under a warrant and survey in 1769; but produced no proof of the payment of the purchase money to the proprietors or to the state. Such a title is not sufficient to recover in ejectment, as it does not give a right of entry.

THE title of the plaintiff was as follows: On the 1st of April 1769, a special application, (No. 39,) for three hundred acres, was made for John Campbell, at Ligonier, near the fort on the Conemaugh, and a small creek running into the same, joining Samuel Duncan, called M'Gee's hunting cabin. On the 5th of June a survey was returned, in pursuance of order No. 39, dated the 24th of May 1769, for John Campbell, situated near the fort on the Conemaugh, and on a small creek called M'Gee's run, at his hunting cabin. The surveyor states, that "at the time of making the survey, T. Armstrong made pretensions to the land, under an order No. 64, but the special order, on which I returned the survey, was not then come to hand." Campbell died; and his widow and administratrix, by order of the Orphan's Court, legally sold the above land to James Christie, in 1773, which she regularly conveyed to him. In 1796, Robert Milligan was appointed attorney in fact by Christie, to sell this land, and in the year 1800, he sold and conveyed it to the lessor of the plaintiff.

It appeared in evidence, that when Christie purchased the land, in 1773, he placed upon it a servant man and his wife, indentured for five years, in order to retain the possession, and take care of the land. The servant man died before the expiration of the five years, and his widow married one Hadabaugh, who continued to live on the land, without paying rent, till about six years ago, when he left it, and the defendants took

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possession. In 1796, Hadabaugh came to the attorney of Christie, in order to buy this land, and offered as much for it as it was afterwards sold for, but it was not then accepted.

The defendants claimed under a lottery order, dated April 3d 1769, No. 64, for three hundred acres, on the forks of the Conemaugh and M'Gee's run, to include a spring. The defendants proved a settlement, near twelve months prior to April 1769; in March of that year, Campbell disseized him, and made improvements, and continued to hold it, before and after his survey. It was proved that the land in question is fifteen miles from Ligonier, and that there was no fort at all on the Conemaugh in 1769, nor does the land join Samuel Duncan; in all other respects, the survey fits the order of April 1st 1769. It was also proved, that no such order as the one recited in the survey of May 24th 1769, was to be found on the books of the Land Office, or amongst the papers. That of the 1st of April, was found duly recorded.

It did not appear, that either of the parties had paid any thing to the state for this land.

The power of attorney from Christie to Milligan, or rather an exemplification of it, was certified by the Lord Provost and chief magistrate of Edinburgh, to have been *acknowledged* by Christie before him, and was certified under the city seal.

This was objected to, by Dallas for defendant, because it is only an *exemplification*, and there is no proof that the original is lost; and it is certified, as having been *merely acknowledged*, whereas the Act of Assembly, passed in 1705, declares, that "letters of attorney, the execution whereof shall have been *proved* by two of the witnesses thereto, before any mayor or chief magistrate of any city, &c. where the same was made, and *certified* under the public seal of such city, &c., shall be good; and all deeds for lands, made by virtue of powers so proved and certified, shall be effectual." This power is not proved, but is acknowledged, and therefore it is not authenticated under the law.

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Tilghman, for plaintiff, admitted that the words of the law were against him, but contended, that the uniform practice in this state had been otherwise, and that powers, proved and certified as this is, have, without objection, been regularly admitted.

Peters, Justice, was for admitting the evidence, upon the principle that *communis error facit jus*. *Washington, Justice*, contra. The law is plain. I know nothing of a contrary practice. The Court being divided, the evidence was admitted.

Dallas offered a paper, signed Richard Wallace, proved to be in the handwriting (except the signature) of Kennedy, secretary of the Land Office, purporting to be the application of John Campbell, of April 1st 1769, but differing from it. The original is lost, and Kennedy is dead.

The Court thought it improper to admit the evidence, against a certified copy of the application, from the records of the Land Office.

The objections to the plaintiff's recovery were—First; that the survey is not a location of the application of April 1st 1769, as it refers to an application differing in date—is not at *Ligonier*, nor near to any fort—and does not adjoin *Samuel Duncan*. Second; the lessor of the plaintiff, having only a survey, without payment of the consideration to the proprietors or to the state, has not obtained a legal title to authorize a recovery in ejectment. Third; the plaintiff has not a right of entry by possession, because it does not appear that those who held the possession, held under *Christie*; nor did they pay rent; which were necessary, in order to make their possession the possession of *Christie*. Run. on Eject. 15. 58. 60. 292. 299. 2 Bac. Abr. 423. 2 Stra. 1128. 1 Wils. 176.

The plaintiff insisted upon an uninterrupted possession from 1769, till about six years ago, when the defendants gained it; but if otherwise, the plaintiff may recover, upon priority of possession, against a disseisor. Cro. El. 438. V.

The other points were also controverted.

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WASHINGTON, *Justice*, charged the jury. Whether the survey for Campbell does or does not fit the application, is a question of some difficulty, but you may discharge your minds from this subject, since the plaintiff places his chief reliance upon his possessory title; and if that will not support him, he cannot recover in the present action upon his paper title, for that does not give him a legal title.

The question, then, for your consideration, is, whether the plaintiff has shown a right of entry? From 1769 to 1778, it is clear, that the premises were in the possession of Campbell, under whom the lessor claims; or of Christie, by his servants. It does not appear that Hadabaugh paid rent to Christie; nor, from any positive declarations from him, whether he held under or adversely to Christie. Whether you will consider his offer, in 1796, to purchase the land, and his subsequent abandonment of it, as evidence of the former, or not, is the question. If you are of opinion that he held under Christie, then it is unimportant whether he paid rent or not; and in that case, you should find for the plaintiff. If you think that he held in opposition to the title of Christie, then your verdict should be for the defendants, since an order and survey, without payment of the consideration, does not give a legal right of entry.

Verdict for defendants.

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CRUDER vs. THE PHILADELPHIA INSURANCE COMPANY.

insurance on the Jefferson, at and from St. Lucia to New-York, with liberty to touch and trade at *St. Kitt's*. The vessel, having lost some of her men at St. Lucia, went into *St. Bartholomew's* to supply the loss, and sustained an injury on her return voyage, she being run foul of by another vessel, the damages from which exceeded fifty per cent. The underwriters claimed to be discharged, on the ground of deviation, and sailing from St. Lucia without being sufficiently manned, which was unseaworthiness. If the accident happen *whilst the property is at the risk of the underwriters*, and cannot be repaired at the port of departure, the vessel may go to the nearest port for the purpose; and she continues in the same situation as to the insurance, as if she had been repaired at the port of departure. The insured are bound to prove, that it was necessary to proceed to another port, and that the vessel went to the nearest port, at which her wants could be supplied.

INSURANCE was effected, on the 17th November 1803, on goods on board the Jefferson, at and from St. Lucia to New-York, with liberty to touch and trade at St. Kitt's, declared to be on eighty hogsheads of sugar. The vessel having lost her mate and two mariners at St. Lucia, sailed to St. Bartholomew's, in order to procure a supply of men, on the 19th of October. She arrived there on the 18th, and, the next day, sailed on her voyage for New-York. The captain, in his deposition, states, that he went to St. Bartholomew's, as the most likely place to get seamen, and because the port charges were lower there than at any of the English islands; that she could not, without such supply, have proceeded on her voyage to New-York, although, with the assistance of a passenger going to St. Bartholomew's, who worked his passage thither, she was sufficiently manned to go there. Being asked if the same end could not have been answered by going to St. Kitt's, he answer-

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ed, that he could not determine as to that, as the wind would not have permitted him to fetch St. Kitt's, if he had been so disposed.

On the voyage from St. Bartholomew's, she was run foul of by another vessel, and so much injured, that the crew abandoned her, and got on board a vessel then near. Part of the crew went on board the disabled vessel for water, and were by a storm prevented from returning. They however brought her safely to New-York, with considerable injury to the cargo, which, with salvage, exceeded fifty per cent. A regular abandonment was made, and refused.

The objections to the recovery, made by Rawle, for the defendants, were—First; that the calling at St. Bartholomew's was a deviation. Second; if not so, then, sailing without being sufficiently manned discharged the underwriters, on the ground of want of seaworthiness. Third; if it should be contended that the voyage began at St. Bartholomew's, then it was a different voyage from the one insured. He cited Park, 229.

Ingersoll, for the plaintiff, insisted that the calling at St. Bartholomew's was from necessity; and that the going there to get a supply of seamen, did not expose the vessel to a charge of want of seaworthiness. He cited Park, 300. 305. 309.

WASHINGTON, Justice, charged the jury. The question is, whether the calling at St. Bartholomew's amounted to a deviation? It is admitted, that if an accident had befallen the vessel on her voyage, the deviation, with a view to repair the loss, would have justified the act; but it is contended, by the counsel for the defendants, that if the accident happen before the inception of the voyage, it exposes the vessel to the objection of want of seaworthiness, if she break ground in that situation. The rule seems to be, that if the accident happen whilst the property is at the risk of the underwriters, and cannot be repaired at the port of her departure, she may, without preju-

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dice to the insurance, go to the nearest port where the damage may be repaired; and that, in doing so, she stands in the same situation as if she had repaired at the place of departure. This principle is laid down in the case of *Motteaux vs. The London Assurance Company*, and seems to be perfectly reasonable. If the vessel is injured in port, (being insured at and from that port, as in this case,) and she cannot be repaired there, to say that she should not be at liberty to go to the nearest port where she can be repaired, is to say that the voyage never shall commence; or, if it do, that the underwriters shall be discharged, although the accident happened whilst she was protected by the policy. It is for the benefit of all concerned, that the step should be taken.

But, in all these cases, it should appear fully to the satisfaction of the jury, that the measure was necessary; and this it is incumbent on the plaintiff to show, if he would excuse the deviation. The only witness, as to this part of the subject, is the captain, who states, that he went to St. Bartholomew's because he thought it more likely that he should complete his crew there, and that the port charges were lower. But he does not state, that he could not have got his crew at another port; and as to the port charges, this was no concern of the defendants, and therefore no excuse. Being asked, if he could not as well have got them at St. Kitt's, he answers, that it was not in his power to determine the question, because, as the wind was, he could not have gone to St. Kitt's, if he had been so disposed. If he refers to the state of the wind when he left St. Lucia, he might have waited till it was more favourable; if he means, when he was off St. Kitt's, the observation would not apply. But one thing is obvious, that whether he could or could not have got to St. Kitt's, he never, from the moment he broke ground, intended to go there. It is unfortunate that the map offered in evidence by the defendants' counsel in his summing up, (and which, to preserve regularity in trials, we thought it

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improper to introduce at that stage of the cause,) had not been sooner offered. However, it is not incumbent on the defendants to show that the vessel did not go to the nearest place to get a crew; the plaintiff should satisfy you that St. Bartholomew's was the nearest port at which his wants could be supplied; and unless you can be thus satisfied, you ought to find for the defendants.

The jury could not agree, and the parties consented to withdraw one, and continue the cause.

JOY ET AL. vs. WURTZ ET AL.,

Where a release is given to one joint debtor, although under a misapprehension of its operating to discharge the co-debtor, a Court of Equity will not relieve from it, unless where there was fraud or unfair practices.

THE bill was brought to set aside a release, executed by the plaintiffs to William Wurtz, of a debt due to the several complainants, by W. & C. Wurtz, co-partners in trade, and which, by a settled account, they had agreed to pay.

In the year 1788, Joy, one of the complainants, took out a separate commission of bankruptcy against Christopher Wurtz, and all his estate, real and personal, was assigned to certain persons, amongst whom Joy was one, for the benefit of all his creditors. In order to obtain from William Wurtz, the title papers of some of the real property belonging to the co-partnership, and in consideration of other separate property delivered by William Wurtz to the complainants, they, on the 30th of March 1789, executed a release to him of all debts, demands, suits, &c., which they have, or might have, for dealings and transactions by the said William Wurtz, or in the name of Christopher & William Wurtz.

Some time after this, the Supreme Court of Pennsylvania, in an ejectment brought by the plaintiffs to recover part of the real property of Christopher Wurtz, decided, that the commission of bankruptcy, issued against the said Christopher Wurtz, was void under the law of this state; the debt of the petitioning creditor having been contracted before the passage of the law, although the agreement of Christopher & William Wurtz to pay, was made afterwards.

Upon this decision, one of the complainants brought an action against Christopher Wurtz, to recover his debt, and the

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release to William Wurtz being pleaded in bar, this bill was filed, in order to have the release put out of the way, as to Christopher Wurtz.

For the complainants, were cited, by Hallowell and Lewis, the following cases, tending to show that in cases of mistake, even of law, a Court of Equity will relieve. 13 Vent. 549. pl. 2. 2 Ch. Rep. 154. 1 Eq. Ca. ab. 27, pl. 2. 28, pl. 6. 1 P. W. 737. 2 Vez. 310. 1 P. W. 130. 2 Vez. 100. 2 Atk. 31. 1 Vern. 32. 3 Atk. 532.

On the other side, were cited 1 Fonb. 116. 2 Vern. 615. 3 Bos. and Pull. 35. 7 East, 456. Doct. and Stud. 147. 1 Fonb. 128. 9 Vez. 125, and particularly 1 Fonb. 106. 108, to show that in such a case as this, *ignorantia legis non excusat*.

WASHINGTON, Justice, (*Peters* absent.) I have considered this case with attention, with a view to discover, if I could, any solid ground upon which to relieve the complainants; for it is clear, that the release to William Wurtz was given under a mistaken opinion, that the proceedings, then depending against Christopher Wurtz under the commission of bankruptcy, would render the instrument inoperative as to him. But if a misapprehension of the legal consequences of a release to one joint debtor, can furnish a sufficient reason for setting it aside, the principle from which such a consequence flows, would be of no other use than to send the releasor, in almost every instance, into a Court of Equity: for, I think it may safely be affirmed, that it can seldom happen that a creditor, who gives a release to one of two joint co-obligors, without receiving full satisfaction, intends thereby to discharge the other; and whether the misapprehension is of the legal effects of the release by itself, or as dependent upon some other legal question which is also mistaken, the reason is the same. It is not pretended in this case, that any unfair practices were used by either of the joint debtors in order to procure this release; or that the complainants were ignorant of any facts material for

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them to know; or that a different kind of instrument was intended by the parties, or directed to be drawn, than the one which was actually executed. In such a case, I am aware of no case in which equity has not followed the law.

The strongest cases cited for the complainants, are those from Vezey and Atkins; but in them, the Court detected the mistake in the bonds, by referring to the nature of the original contracts, of which they were only the evidence, and by this test, the obligors were considered to be severally bound in equity, because they were so by the original contract of loan. It is upon the same principle, that if a settlement differ from the articles, or an instrument is drawn differently from the agreement of the parties, equity will look at the intention. But the principle of those cases is inapplicable to this, which is purely a question of law, attended by no circumstance of fraud, and none of mistake, but such as is common in similar releases, to warrant the interposition of a Court of Equity. Mistakes of this kind are not unfrequent, and yet it is worthy of remark, that no instance has been furnished, in which Chancery has relieved.

There are, besides, circumstances which present this case in an unfavourable point of view for the complainants. It is now twenty years since all the estate of Christopher Wurtz, against whom relief is sought, was assigned to certain persons, in whom the right to dispose of it upon such terms as they might think proper, was completely vested. It is true, that those sales, if any were made, would not conclude Christopher Wurtz, at least as to his real estate; but it is, perhaps, impossible at this day to calculate the injury which that defendant has sustained by an act, which, I am bound to say, violated the law of this state, and the rights of the individual. Can the complainants restore him to the situation in which he was, at the time the commission of bankruptcy was taken out, or at the time when, by the operation of the law, he was discharged from the debts due to the complainants? Can they furnish a plain and satis-

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factory rule, for estimating and compensating those injuries? And unless this can be done, I am at a loss to discover the principle upon which they can entitle themselves to the assistance of a Court of Equity.

The bill must be dismissed with costs.

Anonymous.

ANONYMOUS.

The cause had been at issue for three terms, and the defendant asked leave to file a new plea, the effect of which would be to oblige the plaintiff to suffer a nonsuit. The defendant, before the suit was brought, refused to show his lease to the plaintiff, when, by so doing, he would have prevented the institution of the suit. The Court refused to permit the defendant to enter the plea, but upon his paying the whole costs of the suit.

THIS was a rule obtained by the defendant, after two or three terms that the cause has been at issue, for liberty to amend his plea of covenants performed, which it is admitted, if allowed, will compel the plaintiff to discontinue the action. The plea is certainly a fair one, it being stated, that the defendant is a subtenant, and has paid the rent demanded, to his immediate lessor. But still, the defendant asks a favour, and one which the Court, in its discretion, and upon the circumstances of the case, may grant upon equitable terms. Now, it appears that the defendant, by refusing to show his lease to the plaintiff when asked to do so, misled him into bringing a suit, which, if he had known that the defendant was only a subtenant, he would not have brought, but, by his present plea, he had admitted the lease as laid. He now asks to withdraw his admission, and to plead what must inevitably force the plaintiff out of Court. Upon no principle can he be allowed to amend, without paying the costs which have accrued since he put in his plea. But since he has occasioned the bringing of the suit by his refusal to show his deed, we do not think he ought to be indulged in his present application, so as to throw the other costs on the plaintiff. The proposition of the plaintiff, to discontinue without paying costs, seems perfectly fair.

Lessee of Bowne vs. Brown et al.

LESSEE OF BOWNE vs. BROWN ET AL.

The plaintiff, having recovered at law, the Court directed the costs of the bill of discovery, by which the plaintiffs at law were prevented recovering, should be paid by the defendants in the bill, they being plaintiffs at law.

IN these cases, where the plaintiff has recovered at law against the several defendants, the Court decided, (*Peters* absent,) that the costs of the bill of discovery, brought by the defendants for their own advantage, and which, having had its effect, has been dismissed, should be borne by the plaintiffs in that suit. The Court did not determine how this point would be, if the plaintiffs had failed at law.

Brig Betsey vs. Duncan.

BRIG BETSEY vs. DUNCAN.

Mariner's wages.—The seaman left the vessel at the Lazaretto, and after her arrival at Philadelphia he went on board, and did work by order of the mate. The captain afterwards promised to pay him his wages.

It did not appear that an entry of desertion at the Lazaretto was made in the log-book, and no good cause for the nonpayment of the wages being shown, they were ordered to be paid.

THIS was an appeal from the District Court. The libel states, that the libellant shipped on board of this brig at Liverpool in 1807, on a voyage from thence to Philadelphia, and thence to Hayti. On her arrival at Philadelphia, the crew were all discharged, and the voyage changed. The libellant went in another vessel to Port-au-Prince, where the Betsey afterwards arrived, and the captain of her seized the libellant, and obliged him to serve on board the Betsey to Philadelphia, where he was discharged. He claims sixty dollars for his wages from Port-au-Prince to Philadelphia.

The captain, in his answer, admits the contract, but denies that he discharged the crew at Philadelphia, but stated that the libellant deserted her there; denies that the voyage was changed; admits that he seized the libellant in Hayti, and that he served as a common seaman back; but, that at the Lazaretto he deserted the vessel, and never returned to her again.

The desertion of the libellant at the Lazaretto, and that he never returned there, is proved by Campbell, one of the mariners on the inward voyage. The pilot proves the desertion, and that he never heard of his return to the vessel; but he left her at the Lazaretto.

William Brown, one of the mariners, states, that at the Lazaretto, the captain threw overboard the libellant's bed, &c.;

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that he went on shore, and the vessel set sail and left him ; at Philadelphia he came on board, and did work, as ordered by the mate, till discharged. William Raison, who was employed at Philadelphia in discharging the vessel, proves, that the libellant came on board, and went to work by orders of the mate and captain ; that the captain promised to discharge him the next day, and to pay him his wages.

WASHINGTON, Justice. It is unnecessary to give any opinion as to the original contract to go from Philadelphia to Hayti, which, being prohibited by the laws of the United States, seems to be relied upon by the captain, as a reason for not paying the wages claimed by the libellant. That contract was put an end to at Philadelphia, if the statement made by the libellant be true, and if not so, still it was not unlawful for the libellant to enter on board this vessel at Hayti, as a mariner, on a voyage to Philadelphia. The question is, did he forfeit his right to wages, by desertion, before the voyage was finished ? The affirmative of this fact is stated by one witness, positively, and another speaks only of his going on shore, but does not represent it as a desertion ; nor does he know whether he returned again or not. Two other witnesses prove that he came on board at Philadelphia, did work by orders of the mate, and one proves that the captain promised to pay him his wages. It does not appear that the captain made any entry on his log-book, that the libellant had deserted or left the vessel without leave ; and as a good cause should be assigned and proved for not paying his wages, we must, upon the evidence in the cause, say that the libellant is entitled to recover them.

The sentence below must be affirmed, and the clerk is to ascertain the wages due, conformably to the agreement of the parties.

Stevelie vs. Read.

STEVELIE vs. JOSEPH READ, ADMINISTRATOR OF BARTOW.

A record of a judgment obtained by the plaintiff in North Carolina, against James Reed, administrator *de bonis non* of Bartow, was properly given in evidence to the jury; parol evidence having proved that the defendant, Joseph Read, had attended the taking of depositions in the case, while depending in the Court of North-Carolina, and that notice of this suit was given to him.

The rule of law is, that a judgment is inadmissible in evidence, except between the same parties, or those in privity with them, and for the same cause of action.

A mere misnomer is not sufficient to exclude the record of such a judgment from being given in evidence, if, in point of fact, the party appeared by a wrong name, and instead of pleading the misnomer, went to issue on other points, and judgment was given against him.

An averment, in the action on the judgment that he is the same person, if made out by proof, will fix the liability of the defendant for the judgment.

ACTION for money had and received. The case was as follows. An action was instituted in the State Court of North Carolina, in the name of Thomas Bartow, against J. Goodman, in September 1793, for the recovery of a sum of money due, in which suit the plaintiff was bail for Goodman. In March 1794, judgment was rendered for ——— dollars. In September 1798, a *scire facias*, reciting the death of Bartow, and the appointment of executors, issued in the names of the executors, for reviving the said judgment, and the same was revived. Bartow died in January 1793, before the action was brought, which Stevelie, the bail, pleaded to a *scire facias* brought by the executors, in order to charge him with the debt. This *scire facias* issued in September 1799; the plea was overruled on demurrer, and in December 1800, judgment was given

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against the bail. Execution issued in March 1801, against Stevelie, which was returned, levied and satisfied. The executors named by Bartow, resigned the execution of his will, and Joseph Read, the defendant, was, on the 4th of January 1798, appointed administrator *de bonis non*, with the will annexed.

In September 1801, Stevelie sued out a writ of error, as administrator of Goodman, who was then dead, to reverse the original judgment against Goodman, assigning for error the death of Bartow before judgment was rendered. The executors of Bartow pleaded *in nullo est erratum*. The jury found the death of Bartow in February 1793, and in September 1802, the original judgment was reversed, and a writ of restitution awarded. The writ was served on G. Hawser, the former agent of Bartow, who stated, that his powers ceased with the death of Bartow, and that he had received nothing on the execution, and had nothing to restore. The writ was dismissed. On the motion to amerce the sheriff for the above return, it appeared, that on the 22d of February 1798, Joseph Read, administrator with the will annexed of Bartow, appointed G. Shober, his attorney, to sue for, demand, and recover all sums due to him as administrator, &c., by J. Goodman; and a receipt was produced, given by Joseph Read, for six hundred and thirty-six dollars, received from said Shober, which, with one hundred dollars wrongfully detained by Williams, the attorney, and thirty-four dollars, Shober's commission, was in full of the debt due by Goodman to Bartow's estate. This was dated in May 1803; also a letter from G. Haga, one of Bartow's executors, dated the 12th of February 1798, to G. Shober, mentioning the resignation of the executor, and the appointment of Read, as administrator, from whom he, Shober, was to receive orders in future.

On the 3d of July 1804, a notice was given by the plaintiff to the defendant, Joseph Read, that, on such a day, he should move the Superior Court in North-Carolina, for a writ of error, to reverse the judgment obtained in the name of the executor of Bartow against him, the said Stevelie, as bail for Goodman;

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the service of which notice was proved. Agreeably to notice, the writ of error was moved for in September 1804, and granted against James Reed, administrator *de bonis non* of Thomas Bartow, to reverse the judgment against said Stevellie, as bail of Goodman. The death of Bartow was assigned as the principal error. James Reed, administrator *de bonis non* of Bartow, appeared by E. Williams, his attorney, and pleaded *in nullo est erratum*. The fact assigned, being found for the plaintiff in error, judgment against the plaintiff as bail, was reversed in March 1806.

The jury, upon the above evidence given in this cause, found a verdict for the plaintiff, subject to the opinion of the Court on the following point reserved, viz., whether the record of Stevellie vs. James Reed, administrator, was properly admitted in evidence to the jury, parol evidence having been given, that the defendant, Joseph Read, attended the taking of depositions, and the examination of witnesses in the suit, to reverse the original judgment against Goodman, on notice given to him, *prout* the notice, and that notice was given to him (*prout* notice and affidavit,) that a writ of error would be brought to reverse the judgment against the plaintiff, as special bail; and if the said record, was not properly admitted, then whether this action can be supported upon the above parol proof, and the other written evidence in the cause. If the opinion of the Court is in the affirmative, on both or either of these points, judgment to be entered for the plaintiff; if in the negative on both points, judgment to be entered as in case of a nonsuit.

WASHINGTON, Justice, delivered the opinion of the Court. The first question to be considered is, whether the record in the suit of Stevellie against James Reed, was properly admitted in evidence in this suit, against Joseph Read, administrator of Thomas Bartow? The rule of law is clear, that a judgment is inadmissible in evidence, except between the same parties, or those

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in privity with them, and for the same cause of action; and unless it appear, that the parties to the record offered in evidence, be in fact the same as those to the suit in which that record is offered, it may be laid down, as a general rule, that such evidence is inadmissible. We say, as a general rule, in order to avoid giving a decided opinion, whether if a judgment be reversed and made void, though a wrong person be made party to the writ of error, such reversal may or may not be given in evidence, in an action against the person who actually received the money, in virtue of the judgment which was reversed. It is not necessary now to decide that question; but we shall inquire whether, in point of fact, Joseph Read, the present defendant, was or was not a party to the proceedings, in which the judgment against the plaintiff was reversed. It was admitted, in argument, that the mere misnomer is not sufficient to prevent the evidence from being admitted, if, in point of fact, the party appeared by a wrong name, and instead of taking advantage of the misnomer, by a plea in abatement, went to issue upon other points, and judgment was given for or against him. The averment in the second action, that he is the same person, if made out in proof, will fix his liability to satisfy the first judgment. Now, what are the facts in this case? In January 1798, the defendant was appointed administrator of Bartow; the next month he appointed G. Shober, of North-Carolina, his attorney, to demand and sue for this identical debt due from Goodman. In 1801, he was apprized of the writ of error brought by Stevellie, to reverse the original judgment obtained against Goodman, and attended (nominally, it is true, as attorney, but in fact in his proper person, as representing Bartow,) the taking of depositions in that suit. It is worthy of observation, that the same person who is mentioned in the defendant's receipt, as the attorney who had retained too much for his fee, of the money recovered and received from the plaintiff on the execution against him, appeared to this writ of error, and pleaded *nullo est erratum*. This judgment being reversed, the plain-

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tiff, in July 1804, gave notice to the defendant, that a writ of error would be moved for, to reverse the judgment against him as bail. The writ was granted, and we find an appearance entered for the administrator *de bonis non* of Thomas Bartow, but misnamed James, instead of Joseph, and a regular plea put in. Now, can there remain a doubt, but that this evidence fully supports the averment that Joseph Read, the defendant in this suit, and James Reed, the defendant in the writ of error, are one and the same? The surname is the same, the description of character is the same, but the Christian name is mistaken. Is it conceivable, that with full notice to the defendant of both writs of error, and with an attorney in fact in North-Carolina, an appearance would have been entered, except by his orders, or those of his attorney? That without such orders, any person unauthorized, would have appeared; or that knowing of the proceedings, the defendant would so far neglect his duty, as not to attend to and defend that suit, particularly as he had previously received the money? It is impossible, that against such a mass of proof, we can doubt as to the fact. If so, the record was properly admitted, and judgment must be rendered for the sum found by the jury.

Hallet et al. vs. The Phoenix Insurance Company.

HALLET ET AL. vs. THE PHOENIX INSURANCE COMPANY.

It is a uniform rule, in estimating the loss upon a vessel which has never been heard of, and is therefore considered as lost, to calculate interest after twelve months and thirty days from the last period when the vessel was heard from.

VESSEL lost, and never since heard of, on a voyage from Curraçoa. The question submitted to the Court was, from what time interest is to run, and the vessel to be considered as lost?

A witness was examined, to prove that it is the uniform and undeviating rule in all cases, even of coasting vessels, to calculate interest twelve months and thirty days from the last time she is heard from. No instance of a case to the contrary was shown, and it was stated to be the custom as to all the offices.

By the Court. Upon this evidence of a uniform usage upon this subject, we shall consider ourselves bound by it, and in this fix the interest to run from twelve months and thirty days, from the last period when the vessel was heard from.

GREEN ET AL. VS. ALLEN.

The lien of a judgment which bound real estate, is not lost, if after a *testatum fieri facias* has been levied and returned, the plaintiff, in the writ, ordered further proceedings to be stayed. *Aliter*, if personal property is levied upon, and suffered to remain in the hands of the defendant in the execution.

JUDGMENT was obtained by the plaintiffs, in this Court, on the 10th of December 1807. A *fi fieri facias* issued, returnable in April 1808, which was levied on the personal and real estate of the defendant: the personal being sold, and being insufficient to discharge the debt, the real estate of the defendant, lying in Bucks county, was, upon an inquest taken by the Marshal, returned to be insufficient by its rents, to pay the debt in seven years. Upon this return, a *venditioni exponas* issued, returnable to the present term, by virtue of which the real estate was sold, and the money is now in the hands of the Marshal.

In December 1806, James M'Culloch brought a suit, and in March 1807, obtained a judgment in an action of debt on a promissory note against the same defendant, in the Court of Common Pleas of Philadelphia county. On the 19th of August 1807, a *testatum fieri facias* issued to the sheriff of Bucks county, on this judgment, who levied it on the same land, and returned, on the 25th, that it had that day come to hand, and that further proceedings had been stayed by order of the plaintiff. No further proceedings appear to have been taken.

On a rule obtained, by Meredith, counsel for the plaintiff, to show cause why this judgment should not be satisfied, (it appearing that the sale of the land is not sufficient to satisfy both judgments,) the Court were of opinion, that the levy made in August, under M'Culloch's execution, gave him a prior

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lien, which the suspension of further proceedings did not impair, so as to give a preference to the plaintiff in this motion. This is not like an execution levied on personal property, where the property is suffered to remain in the hands of the debtor.

Rule discharged.

Byrne vs. Holt.

BYRNE, vs. HOLT.

A judgment entered on a bond with warrant of attorney, was set aside, the defendant having, some months before the time of executing it, resided in this state, and describing himself in the bond, as late a resident of the state of Delaware.

THE defendant obtained a rule upon the plaintiff, to show cause why the judgment entered in this case, and the execution, should not be set aside. The judgment was entered in the clerk's office on a bond, with a power of attorney to confess judgment, dated in September 1806. The judgment was entered in December 1806, and an execution issued, which was levied. The ground of the motion was, that the plaintiff and defendant were both citizens of this state. To prove that the defendant was so, a deposition was read, stating, that in July 1806, the defendant, with his family, was residing on land in this state, which he had rented, and was carrying on business as a merchant. The bond stated the defendant to be late of Delaware state.

By the Court. If this had been a case of a plea to the jurisdiction, the evidence would have been sufficient to prove the allegation in the plea, that Holt was a citizen of Pennsylvania at the time the judgment was rendered. It is proved, that in July 1806, he was living with his family, and keeping house on rented land in this state, and carrying on business as a merchant. In September, the bond states that he had been a resident of the state of Delaware, and of course that he was not then so. This is so strongly corroborative of the fact proved by the deposition, that we must consider that he continued an inhabitant and citizen of this state in December following, unless the contrary had been proved.

Rule made absolute.

Shoemaker, for defendant.

Ross, for plaintiff.

Walter et al. vs. Ross et al.

WALTER ET AL. *vs.* ROSS ET AL.

A summary of the law relative to stoppage *in transitu*.

The endorsement and delivery of a bill of lading, or the delivery of the bill without endorsement, if the cargo is, by the terms of it, to be delivered to a particular person, amounts to a transfer of the property, subject to the right of the vendor, if the consideration be not paid, to reclaim the property before it shall get into the actual possession of the vendee.

If a factor sell, *bona fide*, the goods of his principal for a valuable consideration, by assigning over the bill of lading, the sale is valid against the principal. But such a sale is not valid, unless the bill of lading for the goods has been received by the factor.

The principal may follow the money in the hands of the purchaser, and if not paid to the factor, he may recover it.

Goods sold, *bona fide*, while at sea, by assignment of the bill of lading, the right of the principal to stop *in transitu* ceases.

A factor has no property or interest in the goods beyond his commissions, and cannot control the right of the principal over them.

WASHINGTON, *Justice*, delivered the opinion of the Court. This is an action of trover and conversion, in which a verdict has been found for the plaintiffs, subject to the opinion of the Court upon the following case.

Shoemaker & Traverse, merchants, of Philadelphia, became considerably indebted to the plaintiffs, of Boston, in the year 1806, in a course of commercial dealings which had taken place between them. With a view to discharge this debt, they made various shipments of goods, sometimes to the plaintiffs, and sometimes to other houses, with orders to pay over the proceeds to them; and it was to be remarked, that every consignment to the plaintiffs was accompanied by a bill of lading and invoice. On the 1st of November 1806, Shoemaker & Traverse wrote to the plaintiffs, and promised to make them a remittance by the middle of that week, but without expressing

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in what way, whether by bills, money, or goods; but on the 8th of the same month they explain their meaning, and upon receipt of a large sum of money expected from St. Thomas's, promised to remit a draft on one of the Boston banks. On the 19th, they mention their expectation of receiving a considerable sum in specie, and certain cargoes of West India articles, and promise a remittance as soon as they arrive, in which expectation they were probably disappointed, as nothing more was heard of this remittance, and in fact, the correspondence between the parties seemed to have terminated until the 27th of December, when Shoemaker & Traverse announced their failure, and determination to call their creditors together. Before this latter period, Shoemaker & Traverse had purchased and shipped on board the Goram, a general ship, then lying in the port of Philadelphia, sundry parcels of flour, and amongst them, one hundred and fifty barrels, purchased from the defendants, which, however, were never paid for. For this parcel, the captain of the Goram signed three bills of lading, by which, taken in connexion with the invoice, he engaged to deliver the flour to the plaintiffs or their assigns, and they expressed that the same was shipped on account, and at the risk of the shippers. These bills bear date the 3d of December 1806, one of which was retained by the captain, and the other two by Shoemaker & Traverse. Shoemaker & Traverse, about the 5th of December, finding that they would be compelled to stop, and understanding from their clerk, that this flour had been purchased from the defendants, and not paid for, they directed him to return them the flour, and to do whatever might be necessary to give them possession of it. The clerk, in obedience to these orders, delivered to the defendants the two bills of lading which had been retained, and returned to them the bills of parcels. The captain refusing, however, to give up the flour, the defendants sued out a writ of replevin, and in this way obtained possession of it. It appears, by the evidence of Mr. Shoemaker, that Shoemaker & Traverse had received no orders from the plain-

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tiffs to make this shipment; that, though shipped at their own risk, and upon their own account, it was, nevertheless, their intention, that the nett proceeds should be applied towards the discharge of their debt to the plaintiffs. No bill of lading, invoice, or letter of advice, respecting this shipment, was at any time forwarded by Shoemaker & Traverse to the plaintiffs. But the captain, upon his arrival at Boston, delivered to the plaintiffs the bill of lading, of which he was possessed. The question is, are the plaintiffs entitled to recover?

A number of cases have been read and relied upon, to prove, on the one side, that Shoemaker & Traverse had a right to stop this flour before it got into the possession of the plaintiffs; and on the other side, that no such right existed. It is not easy to understand how the doctrine, in most of those cases, respecting the right of stoppage *in transitu*, can be made to bear upon this case. For, in the first place, this is not the case of a sale by the shipper to the consignee; and if it were, being made to a creditor, whose debt exceeded the value of the flour, it cannot be said that the consideration had not, or might not be paid. A contract of sale, accompanied by delivery, amounting to a complete transfer of personal property, the question would naturally arise, how far the shipment of a cargo by the vendor to the vendee, constituted such a delivery, as would deprive the former of his equitable right to reclaim the property, until the consideration is paid or secured. This point first occurred in equity, and was decided in the case of *Wiseman vs. Vandeput*, (a), and afterwards in *Snee vs. Prescott*, (b); where the right of the vendor to stop the goods *in transitu*, in case of the insolvency of the vendee, before the goods had come into his actual possession, was established. The same question soon arose in the Courts of law, who, adopting the equitable principle laid down in the above cases, gave similar decisions in favour of the vendor. They considered the endorsement and delivery of the

(a) 2 Vern. 203.

(b) 1 Atk. 245.

bill of lading, or the bill without an endorsement, if the cargo is, by the terms of it, to be delivered to a particular person, as amounting to a transfer of the property to the vendee, subject, nevertheless, to the right of the vendor, if the consideration be not paid, to reclaim the property before it should get into the actual possession of the vendee, until which time the contract, to use the words of Justice Ashurst, in *Lickbarrow vs. Mason*, was considered as ambulatory. All the cases to be met with in the books, are either those of goods shipped by order of the consignee, and upon his account, and at his risk, or without orders, and for account and at the risk of the shipper. The first class of cases is founded upon contracts of sale; such as *Fearon vs. Bowers*, 1 H. Blac. 364. *Stokes vs. La Riviere*, 3 T. Rep. 466. *Hunter vs. Beal*, cited, *ib.* *Burghall vs. Howard*, cited, 1 H. Blac. 365. *Hodgson vs. Loy*, 7 T. Rep. 440. *Ellis vs. Hunt*, 3 T. Rep. 464. *Hunt vs. Ward*, cited, 466. *Mills vs. Ball*, 2 Bos. and Pull. 457. *Holst vs. Pownell*, 1 Esp. Cases, 242. *Northey vs. Field*, 2 Idem, 163. *Stubey vs. Howard*, 2 H. Blac. 504. *Lickbarrow vs. Mason*, 2 T. Rep. 63. *Salmons vs. Nissey*, 3 T. Rep. 674. *Fowler vs. M'Taggart*, 7 T. Rep. 442. *Fuse vs. Wray*, 3 East, 93.

With respect to goods shipped without orders, and upon account and at the risk of the shipper, they are all cases of principal and agent or factor; and the law, in respect to these cases, depends upon circumstances peculiar to each. If the factor sell the goods to a *bona fide* purchaser, for a valuable consideration, by assigning over the bill of lading, there is no distinction, in principle, between such a case and those just mentioned; for if the bill of lading and the endorsement, where one is necessary, direct the goods to be delivered, generally, third persons are not to know but that the property is in the consignee as vendee; and if a purchase be fairly made, it is nothing less than a sale by the consignor, through the intervention of an agent. But whether even this could be done, before the goods had got into the actual possession of the factor, was made a question in

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the case of *Wright vs. Campbell*, 4. Burr. 2046, in which the whole doctrine upon the subject was laid down by Lord Mansfield. The points decided by him were, that no matter how general the endorsement of a bill of lading is, yet, as between the principal and factor, the former retains a lien until delivery, and even until the property is actually sold and turned into money; and that the property may even be followed into the hands of an assignee of the bill of lading, who had notice of the circumstances. But if the goods are, *bona fide*, sold whilst at sea, by assignment of the bill of lading, the right of the principal to stop *in transitu* is defeated, because, in such case, the property had been sold by the authority of the real owner. *Appleby vs. Pellock*, cited in *Abbot*, 240, of which we can find no full report, was either a case of goods consigned by order, and of course sold, or a consignment to a factor, who, *bona fide*, assigned away the bill of lading. The case of *Duke vs. Lumiden*, (a), is that of a consignment to a factor, who fairly assigned the bill of lading for a valuable consideration. In *Snee vs. Prescott*, (b), *Ragueneau*, the Italian factor, was considered as entitled to stop the goods *in transitu*, in respect of the interest which he had in them; having paid out of his own pocket a part of their price, although the goods were in fact taken in part for goods belonging to *Tollet*, his principal.

If the factor has not sold the goods in the manner just mentioned, it is impossible that any question can ever arise, as between him and his principal, respecting the right of the latter to reclaim the property at any time before they are *bona fide* sold. The factor has no property or interest in the goods beyond his commissions, and of course cannot controvert the right of his principal. If, indeed, he be a creditor of the shipper, he has a contingent interest in virtue of his right of lien, which the possession would give; but for the perfection of this right, he must acquire and retain an actual possession of the property;

(a) *Peake's Cases*, 182.(b) 1 *Atk.* 245.

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a constructive possession will not do, *Kinloch vs. Craig*, 3 T. Rep. 119. 783.

In the cases just mentioned of goods shipped without orders, and at the risk and upon the account of the shipper, it will be observed that the consignee, who is strictly a factor, claims the property for the use of the shipper, and, consequently, the latter, as has been stated, may at any time countermand the consignment. But it may happen that the consignee is entitled to the property for the use of a third person; and in that case, though he acts as agent for the shipper, he stands in the character of a trustee for such third person; and if the consideration has been paid, by the *cestui que trust*, the consignor can no more reclaim the property, than he could if the same had been consigned directly to the person, for whose use the property was intended. The consideration may be said to be paid, if the goods are shipped in satisfaction of a pre-existing debt.

How do these principles apply to the present case? What is the evidence of the plaintiff's title? The bill of lading authorized the delivery of the flour in question to the plaintiffs, or to their assigns. But, for whose use? Judging from the import of the bill of lading, taken in connexion with the invoice, the answer is obvious;—for the use of the shippers, upon whose account, and at whose risk, the shipment was made. What is this, then, but the naked case of a consignment by a merchant to his factor, to sell, and to apply the proceeds as the shipper should direct? Suppose the flour had not been stopped, but had arrived safe at Boston—where would have been the evidence of the plaintiffs' right to demand a delivery of it to them? They had no bill of lading, no invoice, not even a letter of advice, to produce as the evidence of their right; and the bills of lading, being negotiable, from the terms of them, might have been passed by the plaintiffs into the hands of a third person. The possession of the bill of lading by the person to whom the cargo is deliverable, whether as original consignee or as en-

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dorsee, vests in him a legal right to the property. *Caldwell vs. Ball*, 1 T. Rep. 305. But no such transfer arises from the bill retained by the master, because such is not the intended operation of it. Abbot says, (p. 143,) that "three bills of lading are taken by the shipper, one of which he retains, and the other two he sends to his agent, or some other person, one by the vessel, and the other by some other conveyance." But he adds, "the master should also take care to have another part, *for his own use*:" by which it would seem, that his part transfers no right to any one. It is for his own use, and is evidence of his right to collect the freight. Can it be possible, that the master should have it in his power to vest a legal right in the consignee, or to withhold it, by giving or refusing him possession of a paper intended, solely, to serve the purposes of the master himself? Certainly not. The Court wishes not to be understood as meaning to say, that a bill of lading, endorsed to a particular person, or which, in the body of it, directs the delivery to him, is essentially necessary to invest him with a right to demand the cargo. The possession of a bill of lading to order, not endorsed; a promise by the shipper to endorse it, or to send a bill of lading; or perhaps even a letter of advice, stating the shipment to be to a particular person, may, as between these parties, and where the consideration is paid, give to the consignee an equitable title, sufficient to repel the right of the consignor to countermand, and even to defeat the legal right of the holder of the bill of lading, with notice of the circumstances. The master would, in such case, certainly act at his peril, in delivering the cargo to such equitable claimant; but if his title, as such, can be made out, it is probable he would incur no risk. Had Shoemaker & Traverse been bound, by any prior agreement with the plaintiffs, to make this shipment on account of their debt; or even if the bill of lading had been forwarded by them to the plaintiffs, with a letter of advice stating the purpose of the consignment; or possibly, (as to which, however, no positive opinion is intended to be given,) if such

a letter, without the bill of lading, had been forwarded; a very different case would have been presented to the view of the Court, from that under consideration. If the flour had got into the actual possession of the plaintiffs, they might have retained it, in virtue of their lien, for the balance of their account. But here is no contract—no transfer of property, by means of a bill of lading, or even a letter of advice—no specific appropriation of the proceeds, and no possession by the consignee. No contract, because, though the letters of the 8th and 19th of November speak of remittances generally, yet so far from making an appropriation, or containing a promise to appropriate this particular cargo to the payment of the debt due from Shoemaker & Traverse to the plaintiffs, they obviously refer to a remittance, in drafts, in specie, or in West India goods, which Shoemaker & Traverse expected to receive.

If there be any case in the books, which decides the right to be in the intended consignee, under such circumstances, we have not met with it; and yet it is believed, that not one case has escaped our researches. *Harbin vs. Smith*, 1 B. & P. 565, was the case of a consignment to a factor or trustee, in pursuance of a special agreement that the goods should be sold, and the neat proceeds applied to the indemnification of a third person, for advances to be made, and which were actually made. The legal title was vested in the consignee, subject to a trust in favour of a third person, who had paid a valuable consideration for the property shipped; of course, the right to stop *in transitu* could not occur. In the case of *Hobert vs. Carter*, 1 T. Rep. 745, the bill of lading was endorsed and delivered by a debtor to his creditor; which the Court considered as, *prima facie*, a transfer of the property itself, and as a payment *pro tanto*. But, when it afterwards appeared upon a second trial, that the real intention was only to charge the neat proceeds, the Court determined, that the property *in the goods* did not pass by the endorsement, and that consequently the consignor had an insurable interest. In the case of *Kinloch*

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vs. Craig, 3 T. Rep. 219. 783, a bill of lading and an invoice were transmitted, and the object of the consignment was declared to be, to enable the consignee to discharge certain acceptances, made on account of the consignor; but the bill of lading not having been endorsed, no right passed to the holder of it, as owner, and he was considered as standing merely in the condition of a factor. The case of *Smith vs. Bowles*, 2 Esp. Cases, 578, and *Atkins vs. Burnett*, 1 Sera. 165, amount to nothing more than this: that if a debtor send specie or goods to his agent, to be delivered over to his creditor, though without the knowledge of the creditor, the agent is not only bound, by accepting the consignment, to perform the trust, but the possession of the agent or trustee, so far vests in him the absolute property clothed with the trust, that it is not afterwards countervailing by the debtor. In these cases, there was a specific appropriation made, by the debtor—an express declaration of the trust, to the perfection of which nothing was wanted but the assent of the *cestui que trust*; but which, according to the case of *Brand vs. Lesley*, Yelv. 164, amounted to a transfer of the right until dissent; and further, there was an actual possession of the property in the trustee.

It has been before stated, that in the case before the Court, there was no possession in the plaintiffs, or in any other person for their use; for surely it cannot be contended, that the mere possession of the master of a general ship, was the possession of the plaintiffs. It has also been stated, that in this case there was no appropriation of this flour—no written, and not even a verbal declaration of a trust in favour of the plaintiffs. The fact is certainly so. The private intentions of Shoemaker & Traverse were to apply the neat proceeds of this shipment to the payment of their debt, but it was at all times in their power to change such intention; and, certainly, to permit the rights of third persons to be affected by a subsequent declaration of those intentions, could be supported by no principle of law or equity. Suppose this consignment had been made to some third person;

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but *intended* to be for the purpose of satisfying the plaintiffs' demand; could the right of Shoemaker & Traverse to countermand the consignment have been questioned? and in what would the supposed case differ from the real one, except in this, that if, in the latter, the flour had got into the actual possession of the plaintiffs, they might have retained it by force of their lien? Had Shoemaker & Traverse thought it more for their advantage to sell this cargo at Philadelphia or elsewhere, than at Boston; or chose to make an equal distribution of it amongst all their creditors; or to prefer the defendants to the plaintiffs; neither the bill of lading in the possession of the master, nor their former mental determinations, could oppose the exercise of their right to do so; and upon paying the master his freight, and indemnifying him against the consequences of his engagement to deliver the cargo to the plaintiffs, it was not competent to the master to refuse to return the cargo.

The proposition stated by Lord Mansfield, in the case of *Alderson vs. Temple*, 4 Burr. 2235, is much too general to be safely applied in any case. It would seem, as if he had a view to goods which had been ordered and paid for, which would be the common case of vendor and vendee. He speaks of a cargo consigned, which must mean a consignment in the usual way, or accompanied at least by some written evidence of the intended appropriation. If this was his meaning, the dictum (for it amounts to no more, goes no farther than what is laid down in the case of *Atkin vs. Barwick*, upon which he appears to have founded it. The principal case was that of a note endorsed and sent by a debtor to his creditor, and received by him; and the dispute was between the creditor, and the assignees of the debtor.

The case of *Summerl vs. Elder*, 1 Binney's Rep. 126, was that of goods purchased by a factor with funds in his hands, which were put on board, as the property of his principal, and specifically appropriated, as such, by a letter addressed to his principal, as well as by a bill of lading. They were, in fact,

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the property of the person whose funds had been employed in the purchase of them, independent of the bill of lading; as to the effect of which, as stated by the Court in that case, we give no opinion. Justice Le Blanc, in the case of *Cox vs. Hardon*, 4 East, 220, says, that where goods are sent by A to B, according to order, and are shipped on his account and risk, the goods become the property of B, without any bill of lading, subject only to the right of stoppage *in transitu*.

In the case of *Stevenson vs. Pemberton*, 1 Dall. 3, the cargo was shipped by a debtor to a creditor, with orders to sell, and apply the proceeds to the payment of his and other debts. The right of the consignee was established against another creditor of the consignee—but why? Because the goods had not only got into the actual possession of the consignee, but the purpose for which the consignment was made was specified. The case of *Wood vs. Reash*, 2 Dall. 180, decides nothing very important to this point, as the question was left very much to the jury. But in that case, it is stated, that the bill of lading was delivered to the consignee; and one question left to the jury was, whether the consignment was for the use of the consignee or consignor; which might depend very much upon evidence that does not appear in the case. The evidence, as to this, was probably against the consignee, as the verdict was in favour of the plaintiff.

Upon the whole, it is the opinion of the Court, that judgment ought to be in favour of the defendants. It is not an unpleasant consideration, that the legal ground upon which this decision is believed to be made, is consonant with the justice and equity of the case; for although it was perfectly honest in Shoemaker & Traverse to pay the debt which was due to the plaintiffs, it ought not to have been paid with property, to which, in conscience, they were not entitled.

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E. consigned a cargo to the plaintiffs, to whom he was indebted; and, before or on the sailing of the vessel for Copenhagen, the bills of lading for the same were assigned by him to Gardner & Co., who sent the defendant, as their agent, to communicate the same.

The cargo was sold by the plaintiffs, and merchandise shipped to Gardner & Co. in return, and the defendant drew the bill upon which this suit was instituted, in favour of the plaintiffs, on Gardner & Co., for a balance claimed by them, being the debt due to them by E.; which bill Gardner & Co. refused to pay.

In an action by the payee against the drawer, the consideration of the bill may be inquired into.

The endorsement of a bill of lading transfers all the legal right in the property to the assignee, and the consignee cannot claim his debt out of the property shipped to him, unless it was actually in his possession before the assignment of the bill of lading.

Where a consignment had been made by a debtor to his creditor, the transfer of the bill of lading might not take the property from the creditor.

The possession of the consignee, after the assignment of the bill of lading, was the possession of Gardner & Co.; and therefore the plaintiffs could have no lien on the goods consigned to them for the debt of E.

THIS was an action on a bill of exchange, drawn by the defendant on Gardner & Co. in favour of the plaintiffs, which was duly protested, and notice given.

The defendant made out the following case. One Echart, on the 10th of May 1806, shipped on board the *Mary*, a cargo consigned to the plaintiffs, merchants at Copenhagen, for account and at the risk of the shipper. At this time, Echart was indebted to the plaintiffs. On the 26th of May, about the time of the sailing of the vessel, or shortly after, Echart, for a valuable consideration, assigned over the bill of lading to Gardner & Co., the drawees, who immediately despatched the defendant

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to Copenhagen in another vessel, to apprise the plaintiffs of their right to the cargo. The cargo was sold, and the plaintiffs shipped sundry goods to Gardner & Co. in return, which, together with the debt due to them from Echart, made a balance due from Gardner & Co., for which Snell, as his agent, drew the bill on which the suit is brought. If the item of charge against Echart had been omitted, the balance would have been in favour of Gardner & Co. This account, from the heading of it, shows that the plaintiffs knew of the transfer of the cargo to Gardner & Co.

Hallowell, for the plaintiffs, contended, that the bill of lading vested such a title in the consignee, to the amount at least of his debt against Echart; that Echart could not have stopped the goods *in transitu*, and which right he could not divest by an assignment of the bill of lading. Of course, the bill was given for a just consideration.

WASHINGTON, Justice, (Peters absent,) stopped Hopkinson, who was to have argued for the defendant, and observed, that the case was too plain to justify the delay of a further discussion. The principles which must govern the case are so clear, that there cannot be two opinions respecting them. The suit is brought by the payee against the drawer; and consequently, the consideration for which the bill was drawn, may be inquired into. If Echart's debt was not properly chargeable to Gardner & Co., then the bill was drawn without consideration; because, striking out that item, the balance was in favour of Gardner & Co. The legal result of all this would be, that the plaintiffs cannot recover. The endorsement of a bill of lading, transfers the legal right in the property to the assignee, and therefore all the right of Echart in this cargo passed to Gardner & Co., on the 26th of May, by the assignment made on that day. Had the cargo got into the actual possession of the plaintiffs before the assignment, they would have had a right, in virtue of their lien, to satisfy their debt against Echart,

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out of the proceeds. But this lien can never arise, until such actual possession is obtained; and at the time it attaches, the property must belong to the principal, and it continues no longer than the actual possession continues. This was not a consignment by a debtor to his creditor, for the purpose of discharging a debt; but from a principal to his factor, for account, and at the risk of the principal. The possession of the plaintiffs was the possession of Gardner & Co., who had acquired a legal title to the property, long before the goods arrived; and of course they could have no lien, on account of a debt due from Echart. The bill, then, is drawn without consideration, and your verdict should be for the defendant.

The plaintiffs suffered a nonsuit.

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KEITH ET AL. vs. MURDOCH.

H. being indebted to the plaintiffs, made a bill of sale of the ship John to them, to secure the amount of the debt, and went out in the ship as master, she being registered in the names of the plaintiffs. H. borrowed, for his own purposes, from the defendant, a sum of money; and, for his security, transferred to him the bills of lading of the cargo home, for the purpose of his being repaid the amount of the loan out of the freight, payable by the general shippers on board the vessel.

The captain, as *master*, has no right to pledge the freight, to raise money for his private purposes. As the agent of the owners, which the captain may be, in the absence of a consignee, he can act only for the benefit of his principal, and he has no other authority.

If the captain were a mortgagee in possession, he might charge the freight; but if he acted as the master of the vessel only, when he charged the freight with his debt, as his possession was that of the mortgagees, the legal title continued in them, and he could not encumber the freight for his own debts.

THIS was an action brought to recover the freight earned by the ship John, from Havana to Philadelphia, upon sundry goods brought in her, belonging to different merchants. The bills of lading expressed, that the goods were shipped on account and at the risk of the respective owners, and were consigned to them. This vessel had once belonged to a Mr. Haynes, who went out in her as master; but before he left the United States, he became indebted to the plaintiffs in the sum of 1150 dollars; to satisfy, or rather, as it was admitted by the counsel, to secure which, he executed to the plaintiffs an absolute bill of sale for the vessel, and they obtained a register in their own names. The letter of instructions from the plaintiffs to captain Haynes, directed him to go first to Antigua, and there to obtain a freight to Charleston; or, if he could not succeed at that island, he was to go to St. Thomas's for the same purpose; but he was

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consigned to no particular person at either place. The captain, however, went to Havana, and there took in the goods on freight, as above mentioned. The captain, whilst at Havana, being distressed for money, *for his private purposes* obtained a loan of about 700 dollars from the defendant; and, for his security, endorsed to him the bills of lading, and wrote a letter to the plaintiffs, directing them to insure the vessel and freight at 2000 dollars, and requesting them also to pay to the defendant his advances to him out of the insurance. This letter was enclosed by the defendant to the plaintiffs, mentioning his advance, and the security he had obtained, and requesting that the freight might be applied as intended. In answer to this letter, the plaintiffs informed the defendant, that they should make the insurance as requested, and that, in case of loss, and the amount coming into their possession, the claim of the defendant should be attended to. The vessel, however, arrived safe.

WASHINGTON, Justice, charged the jury. It is admitted that the bill of sale by Haynes to the plaintiffs, though purporting upon its face to be an absolute conveyance, was really intended as a mortgage to secure a debt due. This being understood, the letter written by the plaintiffs, to the defendant, is easily to be understood. The debt due to them from Haynes, for which the security was given, amounted to 1150 dollars, and they were directed to insure to the amount of 2000 dollars, which would leave a surplus, in case of loss, sufficient to satisfy also the defendant's advances to the mortgagor. They therefore, with due caution and prudence, promise, that in case of a loss, and the amount coming into their hands, the claim of the defendant should be attended to. But the vessel arrived safe, and of course the amount insured never could come into their hands. The contingency, then, having never happened, upon which a liability in the plaintiffs was to arise, the defendant lost the only plank upon which his claim could be saved. For surely, as master, Haynes had no power to pledge the

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freight, in order to raise money for his private purposes. It was contended, that being consigned to no person, he became necessarily the general agent of his owner; but suppose this to be the case, (which is not admitted,) still he could not in that character, any more than in that of master, pledge the freight for debts of his own. As agent, he could only act for the benefit of his principal, and all beyond that was without the scope of his authority. It was then contended, that as mortgagor in possession of the pledge, he had a power to charge the freight in this case. It might have been so, if he had held the possession as mortgagor. But he acted as master, and servant of the mortgagee, and appeared in this character in his transactions with the defendant. This is abundantly proved by his and the defendant's letters to the plaintiffs. This is a fact, however, submitted to the jury, and is the pivot of the cause. If he acted as master, his possession was the possession of the mortgagee, in whom the legal title to the vessel being vested, the legal title to the freight also vested, as an inseparable incident, unless parted with by the plaintiffs. If the plaintiffs have been overpaid their claim against Haynes, they may be compelled in another way to account, and to pay over any surplus to Haynes, or to the defendant. But in this action, the plaintiffs must recover.

The jury found for the defendant; believing, from the evidence, that the captain was intrusted by the plaintiffs with the possession of the pledge, in his character of *mortgagor*.

M. Levy, for the plaintiffs.

Chauncey and Sergeant, for the defendant.

King vs. The Delaware Insurance Company.

KING vs. THE DELAWARE INSURANCE COMPANY.

Insurance was made on the freight of the Venus from Philadelphia to the Isle of France. On the voyage insured, the ship was stopped by a British ship of war, on the 16th of January 1808; detained for a short time, and discharged, her register being endorsed "warned not to proceed to any port in the possession of His Majesty's enemies." The Venus returned to Philadelphia on the 23d of February 1808, and the assured claimed for a total loss. The Isle of France was not blockaded by an actual force, until after the 1st of February 1808; but the captain of the British ship informed the master and owner of the Venus, that the Isle of France was blockaded, and that she would be prize, which caused the Venus to return to Philadelphia.

Under what circumstances the master of a ship will be justified in abandoning his voyage, from apprehensions of danger.

The actual existence of a blockading force, and only reasonable doubt prevailing that there is danger from it, does not justify a deviation from a voyage insured.

If the underwriter is to be rendered liable for a technical total loss, where none has really been sustained, the insured ought to do all in his power to prevent such loss, and he should proceed upon his voyage until the danger of an actual loss is rendered manifest.

The Isle of France not being in fact blockaded, there was not a legal or actual force to prevent the Venus proceeding there.

Information of the place to which a vessel is proceeding, being surrounded by hostile privateers, will not authorize the captain breaking up his voyage, from an apprehension of danger, and thus make the underwriters liable.

An increase of risk after the voyage is begun, will not excuse the insured, beyond a prudent and necessary deviation in order to avoid it.

Warning and endorsement of papers, do not amount to "an arrest, restraint, or detention."

When the jury assume the right to draw conclusions, which are exclusively the province of the Court, they will be disregarded.

The insurers on the freight of the Venus are not liable for the same, as the voyage was improperly broken up.

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The insured must always state to the underwriters a sufficient reason for his offer to abandon, and if he does so, it is no objection that he does not state other reasons.

If the assured states an insufficient reason for abandoning, he cannot, at the trial, rely upon one not stated in the notice.

THIS was an action founded on a policy of insurance, dated the 5th of December 1807, on the freight of the ship *Venus*, valued at eight thousand dollars, at and from Philadelphia to the Isle of France. The policy was in the usual form. The jury, at the last term, found a special verdict as follows: That the plaintiff chartered the ship *Venus* to L. D. Carpentier, on the 10th of November 1807, as per charter party. [The charter party is for a voyage from Philadelphia to the Isle of France, and thence back, at a freight of twelve thousand dollars, of which two thousand dollars were to be paid at the Isle of France, and the balance on her arrival at Philadelphia.] That the policy was effected by the plaintiff with the defendants, on the freight of the said ship, for the sum of six thousand dollars, as per policy, subject to the conditions therein mentioned. The said ship sailed forthwith, intending to prosecute her voyage to the Isle of France; and on the 16th of January 1808, in the afternoon of that day, while sailing and proceeding on the voyage, she was stopped by the British ship of war, *Wanderer*, in latitude 24° 14' north, longitude 8° 35' west, whose officers took out the papers and crew of the *Venus*, and placed her in the possession, and under the orders of an officer and eight men, in whose custody, and under whose direction she continued from the afternoon of the 16th, to the morning of the 18th of January, following the fleet of which the *Wanderer* was a part of the convoy. That on the 18th, the British seamen were withdrawn from the *Venus*, and her crew restored. That an officer of the *Wanderer* endorsed the certificate of ownership of the *Venus*, as well as her clearance; with the following words: "Ship *Venus*, warned off, the 18th of January 1808, by His Majesty's ship *Wanderer*, from proceeding to any port in

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possession of His Majesty's enemies. Ed. Medley, second lieutenant." That the possession, by the British force, of the Venus, was not as prize, but merely with a view of preventing the Venus from prosecuting her voyage to the Isle of France. That by the interruption, detainment, and warning off by the British force, the voyage of the said ship Venus was broken up. That the Venus returned to the port of Philadelphia, on or about the 23d of February 1808, and that her cargo has been restored to the respective shippers. She arrived in the Delaware on the 21st of February. That from the 5th or 6th of December 1807, until the 1st of February 1808, the Isle of France was not blockaded by any actual naval force. That the plaintiff, captain, and owner of the Venus, was verbally informed by an officer of the Wanderer not to proceed to the Isle of France, declaring that island to be blockaded, and that she would be a good prize if she proceeded thither. That, in consequence thereof, the said King was fully justified in returning to the port of Philadelphia. That on her arrival at Philadelphia, she was unable to renew the voyage, by reason of the embargo, laid on the 22d of December last. The vessel and cargo were American property, and chartered to an American citizen: that King is an American citizen, of New-York; that the Venus had on board all the usual, regular, and necessary papers, and was sufficiently manned, found, fitted, and prepared for the voyage. The jury find the British orders of council, dated the 11th of November 1807, as appears by the London Gazette, published by authority, November 16th 1807; and also subsequent orders of the 25th of November following. If the law is for the plaintiff, they find for him five thousand eight hundred and eighty dollars; if otherwise, for the defendant.

The notice of abandonment stated, that the ship Venus, bound from Philadelphia to the Isle of France, having had her register endorsed, and warned by the British ship Wanderer from proceeding to her destination, has returned to this port, by which circumstance her voyage is broken up; therefore, the

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freight insured by the above policy, is abandoned to the defendants. Dated February 22d, 1808. .

WASHINGTON, Justice, delivered the opinion of the Court. The only question in this cause is, whether the ground of abandonment, stated in the notice, be sufficient in law, to entitle the plaintiff to recover as for a total loss?

This question must depend upon the fair construction of the contract, which these parties have entered into. The nature of the obligation which the underwriter assumes, is, that the vessel or cargo, as either may be insured, shall go in safety to the port of destination; or that the freight shall be earned, if the insurance be upon freight, notwithstanding any of the perils enumerated in the policy; and that, if in consequence of these perils, or either of them, a loss should happen, he, the underwriter, will indemnify the insured against such loss. If the property insured be actually lost, or the voyage be put an end to by any of the enumerated perils, in which case a technical total loss takes place at the option of the insured, he is at liberty to abandon all his interest to the underwriter, and to demand the stipulated indemnification. The question then will be, whether the blockade, declared by the British orders in council of the 11th and 25th of November 1807, and the warning given to the *Venus*, in this case, amounted to a peril within the words "arrests, restraints, and detentions of princes," &c.; for it is not pretended, that any other peril mentioned in the policy, applies to the case. Was she arrested, restrained, or detained, except for the period employed in examining her papers, and from which she was soon relieved? It may be admitted, without difficulty, that a vessel may be restrained, as well by the operation of law, or by an *irrésistible prevention*, from performing the voyage, as by the application of actual physical force. The *vis major* may be substantially the same in its effects in either case, provided, that in the former, there exists in fact a right or a power to make the restraint effectual, and a

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reasonable degree of certainty that it will be and can be so used. An embargo is as much a restraint and detention, although it amounts to nothing more than a legal prohibition against the sailing of the vessel, as if she were taken into the custody of the officers of the government, and were deprived of all the means of removing from the wharf. A blockade, formed by the actual investment of the port of destination, is a restraint imposed by the government to which the blockading squadron belongs, although the vessel is never for a moment arrested, and is left free to go wherever she pleases, except to the invested port. But in this case, the attempt to enter the interdicted port would be a violation of the law of nations, and would be followed, with almost absolute certainty, by the penalty of seizure and confiscation; and there exists *in fact*, a power to make the seizure, and to enforce the penalty. In some cases, the apprehension of restraint has been considered as equivalent to a real restraint, although the danger was not immediate and certain; which, it must be admitted, is going a great way. But it is conceived, that, in such cases, the actual existence of a power to restrain must be shown, and no reasonable doubt should be felt, but that it would and could have been effectually exercised, in case an attempt had been made to enter the port of destination. If the underwriter is to answer for a technical total loss, where none has really been sustained, it is the duty of the insured to do all he may to prevent such loss; and he should proceed upon his voyage, until the danger of an actual loss is rendered manifest.

At the time the *Venus* was notified, by the commander of the *Wanderer*, of the blockade of the Isle of France, she had performed but a small part of a very long voyage. The Isle of France not being in fact blockaded, there was neither a legal nor an actual force to prevent this ship from entering the port of her destination; except the casual danger arising from capture by privateers, to which neutral vessels were exposed, by the injustice and rapacity of the belligerent powers. Of course,

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the situation of the *Venus*, in relation to the perils of arrest or detainment, was in no respect changed, from what it was when she left her port of departure. It is in vain to say that she might, after the endorsement of her papers, have met with British cruisers, in which case this evidence of her having been warned, would have subjected her to capture and condemnation; for this is merely stating an apprehended, instead of a real danger. If the captain of the *Venus* had, on his voyage, received information, and if such had been the fact, that innumerable privateers covered the seas over which she was yet to pass, this would have very much increased the probability of capture, but it would not have justified the insured in breaking up the voyage, and throwing the whole loss upon the underwriters.

An increase of the risk, occurring after the voyage has begun, will not excuse the insured, beyond a prudent and necessary deviation, in order to avoid it; most unquestionably, it will not warrant the putting an end to the voyage altogether, as was done in the present case. *Neilson vs. The Columbian Insurance Company*, 1 John. 301, is a stronger case to justify a deviation than the present, because, though apprehension of danger was the cause of it in both, yet in that, the cause was present, in this it was contingent and remote. It is not necessary for the Court to say, what course the *Venus* might or ought to have adopted after she was discharged by the *Wanderer*, or to attempt to lay down a general rule for the government of the assured in similar situations. The ground of our opinion is, that the reason assigned for the abandonment in this case, is not within any of the perils enumerated in the policy. The notification, warning, and endorsement of the papers, do not, under the circumstances of this case, amount to an arrest, restraint, or detainment. We totally disregard the conclusions of law, which the jury have drawn from the facts found, because they are not competent to draw such conclusions; and in the present instance, we conceive they have mistaken the law. It

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is true, that the voyage may have been broken up, in consequence of the circumstances stated by the jury; but in point of law, this was not a sufficient reason for the step which was taken. Nor can we agree with the jury in opinion, that the verbal communication made to captain King by one of the officers of the British ship, or all the circumstances of the case taken together, justified the captain in returning to Philadelphia.

It is believed that this opinion is in collision with none of the cases which were cited in the argument, and is fully supported by the principles laid down in most of them. An examination of these cases is all which now remains.

The case of *Schmidt vs. The United Insurance Company*, 1 Johns. 249, is certainly the strongest which was referred to on the side of the insured. Without giving any decided opinion upon that case, it will be sufficient to point out the circumstances which distinguish it from the present. In that, the voyage was from New-York to Hamburg. The vessel had progressed as far as the English Channel, when she was regularly notified that the Elbe was blockaded, *and the fact was, that the Elbe was actually invested*. The vessel, however, proceeded to the nearest port to that of her destination. She was warned, comparatively speaking, in the very neighbourhood of the place where her voyage was to end, by a British ship of war; and it was highly improbable that she would find the blockade raised, had she persisted in prosecuting her voyage to Hamburg. The interdiction of trade with that port was legal; a force was on the spot to prevent and to punish the attempt to violate it, and the event was considered as certain, if the vessel had persisted in going thither. Upon the main question the Court was divided, but it seems to have been agreed by all the Judges, that there must be evidence of a blockade *in fact*, and that a mere notification amounts to nothing. In this case, the *Venus* had probably not proceeded a tenth part on her voyage, *no actual investment of the Isle of France existed, and*

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the vessel returned home, leaving it as uncertain then, as at the time of her departure, whether she might suffer from any of the perils against which she was insured.

Scott vs. Libby, 2 Johns. 336, was the case of a vessel turned away from the port of her destination by an *investing squadron*, so that the owner was prevented, by actual *vis major*, from complying with his contract to carry the goods to that port; notwithstanding which, it was decided that he was not entitled to his freight.

The cases of Hurtin vs. The Phoenix Insurance Company, and Simonds vs. The United States Insurance Company, in this Court, turned upon a breaking up of the voyage, in each case, by an actual force operating immediately on the subjects insured, and preventing its completion. In Morgan vs. The Insurance Company of North America, 4 Dall. 455, the goods were carried to the port of delivery, and offered to the consignee, who could not receive them in consequence of an order of the government. The Court decided that the freight was earned. Neilson vs. The Columbian Insurance Company, has been before noticed. It is an authority against the plaintiff, in whose behalf it was cited, for the reasons before mentioned.

These are all the cases which were cited in support of this action, so far as is recollected. It must be admitted, that the case of Hadkinson vs. Robinson, referred to on the other side, was decided upon the special memorandum in the policy, although it did not necessarily turn upon that circumstance; and therefore, it is not to be relied upon as an authority, in a case unaffected by the memorandum. Dyson vs. Rowcroft, which followed soon afterwards, 3 Bos. and Pull. 474, furnishes a satisfactory commentary upon the expressions made use of by Lord Alvanley in the former case. This also was an insurance on articles excepted by a memorandum from losses not total in their nature. The articles were rendered so rotten by sea water, that it became necessary to throw them overboard. Here the peril which produced the total loss of the thing insured,

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acted directly upon it, and produced its destruction; whereas, in *Hadkinson vs. Robinson*, the occlusion of the ports of Naples against British vessels, acted circuitously upon the subject insured, since it could not be positively said that this was the cause of its destruction. Nevertheless, there are a number of very strong expressions used by Lord Alvanley in this case, which would lead to a conclusion, that his judgment would have been the same, if the policy had been upon goods not included within the memorandum; for if the embargo, under the circumstances of the case, was not such a peril as would justify breaking up the voyage, it would have been shorter to say so at once, and the ground of decision would have been more direct and intelligible, than that which was taken. But the case of *Lubbock vs. Rowcroft*, 5 Esp. 50, is conceived to be directly in point, though infinitely stronger than the present, in favour of the insured. That was a policy on twenty bags of pepper, on a voyage at and from London to Naples, Leghorn, or Messina, with liberty to touch at any port in the Mediterranean. When the ship arrived at Minorca, it was found that Messina was in the hands of, or blockaded by the French, in consequence of which the insured abandoned and went for a total loss. Lord Ellenborough considered that the abandonment was made from an apprehension of capture, and not from a loss within the terms of the policy, and that if such was allowed, every ship about to sail from the port of London, to a port which had fallen into the hands of the enemy, might abandon. Erskine, for the insured, admitted, that though one hundred French privateers had covered the seas, so that the probability of capture was great, this would not have justified a breaking up of the voyage, because, notwithstanding the danger was so imminent, the vessel might have escaped; but he insisted, that in that case the capture was certain. This case appears to have been overlooked by the bar and bench, in the case of *Schmidt vs. The United Insurance Company*, or it might probably have shaken the opinion of some of the Judges, if its authority was

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allowed. Without admitting that it is to be considered as such, it may safely be said, that if that decision be nearly right, the opinion of this Court cannot be very wrong. The principle laid down by Lord Ellenborough, that an apprehension of capture does not afford a cause of abandonment, we entirely approve; whatever we might have thought as to its application to the circumstances of that case.

Without determining whether the delivery of the cargo to the freighter, after the return of the *Venus* to the port of Philadelphia, did or did not defeat the offer of abandonment, and without giving an opinion, in this case, upon the effect of the embargo, we think, that upon the point which has been discussed, the law is in favour of the defendants. Our reason for avoiding the last point is, that the embargo is not stated in the notice given to the defendants, as a ground of abandonment, and, consequently, it cannot be relied upon at the trial. It is incumbent on the insured to state to the underwriter a sufficient reason for the offer to abandon, and it is no objection, if he does so, that he does not state other reasons. But if he state an insufficient one, he cannot, at the trial, rely upon one not stated in the notice. This is clear, from the nature and use of an abandonment. The underwriter should have an opportunity of judging whether he is bound to accept the offer or not. If bound, that he may do so at once, and by becoming the owner, may take proper measures for the preservation of the property. To conceal the true ground, is to deceive him into possible error, and materially to affect his interest.

Judgment for defendants.

The United States *vs.* Smith.

THE UNITED STATES *vs.* SMITH.

The defendant was indicted for unlading from a vessel in the port of Philadelphia, three bags of coffee, without authority from the proper officer of the customs. The coffee was taken at night in a boat from the vessel, and part put on the wharf, the rest being in the boat; but on discovery, it was returned to the vessel. The Court decided that this was not a landing within the Act of Congress, of March 2d, 1799.

The twenty-seventh section of the Act applies only to the captain or mate of the vessel.

THE defendant was indicted for unlading from a vessel, which had arrived at the port of Philadelphia, three bags of coffee, without being duly authorized by the proper officer of the customs to unlade the same, &c. It was proved, that the defendant was seen to bring from the vessel in a boat, in the night time, three bags of coffee, which he had got only in part on the wharf, the other half of the bags lying on the gunwales of the boat, when the witness discovered himself. The defendant then took back the bags, and returned them to the vessel.

The Court informed Mr. Dallas, that this was not a landing of the coffee, so as to constitute an offence under the fiftieth section of the law; nor is the defendant charged with landing it. The twenty-seventh section, which makes the unlading an offence, applies only to the captain or mate. The Court directed the jury to acquit the defendant, which they accordingly did.

Dawson vs. Follen.

DAWSON vs. FOLLEN.

In an action for a violation of a patent granted by the United States for an alleged original invention, the plaintiff must satisfy the jury that he was the original inventor, in relation to every part of the world.

Although no proof was made, that the patentee knew that the discovery had been made prior to his, still he could not recover, if, in fact, he was not the original inventor.

THE action was brought for a violation of the plaintiff's patent right for making suspenders.

The case was fully proved on the part of the plaintiff.

But the defendant introduced a number of witnesses, who proved in the most positive manner, that suspenders, precisely similar to the plaintiff's, had been used in England and France, before the plaintiff pretended to have made the discovery, and still longer before his patent issued. Some evidence was given, that the plaintiff had in his possession one of those suspenders, before he obtained his patent, and of course knew that they had been invented in Europe. The question was left to the jury, under the charge of the Court.

WASHINGTON, Justice, (Peters absent,) informed the jury, that to entitle the plaintiff to recover, they must be satisfied that he was the *original inventor*, not only in relation to the United States, but to other parts of the world; in which respect, the Act of Congress differed from the law of England on this subject. That even if there were no proof that the plaintiff was acquainted with the circumstance, that the discovery had before been made, still he could not recover, if in truth he was not the original inventor. Upon the evidence, the charge was strongly against the plaintiff.

Verdict for defendant.

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ODLIN vs. THE INSURANCE COMPANY OF PENNSYLVANIA.

Insurance was effected, 21st December 1807, on the Hazard, to Havana. She cleared on the 21st of December, and sailed on the same day, but was detained by head winds, and was afterwards arrested in the bay of Delaware, and prevented from proceeding, under the embargo law, passed 22d December 1807, and promulgated at Philadelphia on the 24th December 1807; in consequence of which, she returned to port, and was abandoned by the plaintiff to the underwriters. The insured was held to be entitled to recover for a total loss.

It is a general principle of law, that where a contract is lawful when made, and a law afterwards renders performance of it unlawful, neither party to the contract shall be prejudiced, but the contract is to be considered at an end.

An embargo does not render the performance of a contract, the execution of which it prevents, unlawful, but only suspends its execution.

If a law forbid the performance of a contract in part only, he who is bound by it must still perform what he lawfully may.

Under the decisions in the English Courts, the embargoes laid by governments were considered as temporary restraints only, which did not avoid, but merely suspended the performance of contracts on charter parties, and for seamen's wages.

There is no good reason why one may not, for a valuable consideration, in relation to a *real transaction* concerning property, agree to indemnify another against a loss which would result, in case an embargo or such a measure, should be adopted by the government.

THE following case was agreed by the parties, to be considered as a special verdict.

The plaintiff caused insurance to be made at the office of the defendants, by a policy dated the 21st of December 1807, upon the schooner Hazard, valued at 3500 dollars, for a premium of five per cent. at and from Philadelphia to Havana, *about* policies and warranties. The policy was duly sealed by

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the defendants, the premium paid by the plaintiff, and the vessel was American property. The vessel, with a valuable cargo on board, cleared out at the custom-house of Philadelphia on the 21st of December 1807, and sailed on the voyage insured; but, owing to head winds, was obliged to stop at Reedy Island, in the river Delaware, and while lying there waiting for a wind, she was arrested, stopped, detained, and prevented from proceeding, by the officers of a revenue cutter, acting under the authority of the President of the United States, in pursuance of an Act, entitled "An Act laying an embargo on all ships and vessels in the ports and harbours of the United States," passed on the 22d day of December 1807; which Act was received and promulgated by the collector of the port of Philadelphia, on the 24th of December 1807. The said officers took away all the ships' papers. Being so, as asserted, prevented from proceeding on her said intended voyage, the said schooner lay at Reedy Island, for some time, after which she was ordered to the city of Philadelphia, by mutual consent of the plaintiff and defendants, without prejudice to the rights or pretensions of the parties in any respect; and has since been sold, by the same mutual consent, for the benefit of whom it might concern. The plaintiff, having received information of the said vessel being so prevented from proceeding, on the 29th of December 1807, communicated the same to the defendants on the next day, repeated the notice on the 8th day of January 1808, and, soon after, he abandoned to the defendants, and claimed payment for a total loss. The question submitted to the Court is, whether, on the facts stated, the plaintiff is entitled to recover for a total or a partial loss, or whether the defendants are entitled to judgment.

WASHINGTON, Justice, delivered the opinion of the Court. The question is, whether an embargo, imposed by the government to which the insurer and insured belong, subsequently to the commencement of the risk, furnishes a legal ground of

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abandonment? The question is thus generally stated, because it will be necessary to inquire—first, whether such an obstruction is within the perils of “arrest, restraint, and detainment of princes, &c.,” and secondly, whether, if comprehended within those expressions, such a contract be repugnant to any principle of law? It is admitted, that this precise case has never received a judicial decision in any of the Courts of Great Britain or of the United States, although it has frequently been glanced at by the Judges; from whom, however, nothing beyond hints of their opinions can be collected. We are sensible of the difficulty of the question, as well as of its importance to the parties, in this and other similar cases; we derive consolation, however, from reflecting, that our opinion, if wrong, is subject to a revision elsewhere.

The first question to be considered, is, whether a domestic embargo amounts to an arrest, restraint, or detainment of the government? That the expressions used in the policy, are broad and strong enough in themselves to include the case of embargo generally, can scarcely be denied, and is established by the decisions which have taken place in relation to foreign embargoes. Still, however, the question remains, whether an exception is to be implied in relation to an embargo imposed by our own government, upon the ground stated by Valin, that no person is presumed to guaranty the acts of his own prince, without an express stipulation. How it should happen that this question should never have occurred in England, it is impossible for us, with any certainty, to determine. This circumstance has been laid hold of by each side in this cause, and each has endeavoured to turn it to his own advantage. Arguments derived from this source, in general, cut both ways. Although neither can rely upon it as decisive in this case, we think the pretensions of the insured to the benefit of it is best founded, for the following reasons. It is believed that he is quite as apt to claim, in every case where there is a chance of success, as the insurer is to resist; perhaps more so. It is

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not probable that the former would easily surrender a right, for which the general expressions of the contract seem to afford at least a plausible ground, unless there were some evidence of a usage to qualify and restrain the literal construction. It is much more likely, that the latter, acquiescing in the natural import of the expressions, would be induced to pay the loss, without perceiving, that in principle there could be a distinction between a foreign and a domestic embargo. Another reason, and one which has no inconsiderable weight with the Court, is, that this seems to have been the opinion of the French jurists; and although they may have been founded upon positive ordinances, yet it is probable they would in this, as we know they have been in other instances, be regarded by commercial men as evidence of the general law of merchants upon this subject; no judicial decision, and no custom, appearing to the contrary. The sea laws and state ordinances of many of the maritime countries of Europe, have, with some exceptions, gradually become incorporated with the commercial law of England, by a kind of tacit adoption, and are, in these cases, considered as evidence of the custom of merchants. These regulations are read in the British and American Courts, and have frequently furnished rules of decision, where the positive law of the country, or former decisions upon the point, had not prescribed a different one. Without taking time to go through, in detail, the different passages from Roccus, Le Gierdon, Valin, Emerigon, and Pothier, we think it may fairly be deduced from what they say, that if a vessel be detained by an embargo, or other temporary restraint, laid by the authority of the French government, *after the risk has commenced*, the insured may abandon; and the passages where they appear to differ may be reconciled, by considering them as sometimes speaking of a restraint imposed *before*, sometimes *after*, the risk has commenced; or differing upon the point, whether the words "*commencement of the voyage*," in the ordinance of Louis XVI., mean what they express, or, *commencement of the risk*. These

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opinions, taken in connexion with the unqualified expressions of the contract itself, create a presumption, which is almost irresistible, that the absence of a positive English authority upon this subject, has arisen from a general understanding amongst merchants and underwriters, that a domestic embargo, equally with a foreign one, is a peril within the words of the policy.

In a case where no express authority is to be found, the opinions of men learned in the law, and the dicta of Judges, which in other instances should be relied upon with great caution, may not be improperly resorted to, as corroborative evidence of the law. These will now be noticed.

Much greater reliance might be placed on the dictum of Lord Holt, in *Green vs. Young*, (a) if it had been purely a case of embargo; yet it is quoted by Park and Marshall, as if the other circumstances of the case had not influenced the opinion. In *Roche vs. Ecbri*, 6 T. Rep. 413, it is obvious that Lord Kenyon, as well as the counsel on each side, were not impressed with any distinction between a foreign and a domestic embargo: for the Judge, after stating that *Roccus*, *Le Gierdon*, and *Green vs. Young*, are, upon examination, all one way, and that in favour of the assured; concludes by saying, that as to a domestic embargo, there would perhaps be but little difficulty in deciding it. There can exist very little doubt on which side the inclination of his mind was. In *Goss vs. Withers*, 2 Burr. 694, the expressions used by Lord Mansfield are certainly very general; and although both Park and Marshall have pressed them into the service to support their opinions, it is not clear that he had in his view a domestic embargo. In the case of *Hore vs. Whitmore*, Cowp. 784, there is every reason to infer, that the opinion entertained by the bench and bar, was, that a domestic embargo affords a cause of abandonment; because, if the contract in that case, was either suspended or put

(a) 2 Ld. Ray. 840. 2 Salk. 444.

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formance is prevented by law, and the law excuses it. What is an embargo? In its nature and design, it imposes a temporary restraint: it is a measure of precaution and state policy, intended by the government either to distress some foreign nation, or to protect the property of its own citizens. It is true, that the embargo imposed by our government, in December 1807, was unlimited as to time, by the terms of it; and the concurrence of the legislative and executive branches of the government, was necessary to remove it. But it was still an embargo. It suspended our intercourse with foreign nations, but did not declare, or mean to declare, that intercourse in itself unlawful. The British embargo, imposed on the 27th of July 1796, in relation to Tuscany, was to continue *until the further order of the council*; and the Russian embargo was made to depend, for its continuance, upon the compliance of Great Britain with the convention, on her part, in respect to Malta. Both were dependent upon events, which the governments imposing them could not control, and the former did, in fact, continue between two and three years. Yet the nature and essence of the measure were not changed. They were considered as temporary restraints which did not avoid, but merely suspended the performance of contracts upon charter parties, and for seamen's wages, the only cases which were brought judicially into discussion.

Let us now see whether a contract by one person to indemnify another, against loss arising from an embargo, which the government to which the parties belong, may, at any future time impose, is inconsistent with the sound policy of the nation. If it be, it is admitted to be void. If such a contract be made pending the existence of the embargo, it is clearly void; because, unless it is meant that the vessel should sail in defiance of the embargo, the contract itself would be nugatory. We do not mean to speak of contracts to be performed after the restraint is removed. We can see no good reason why one man may not, for valuable consideration, and in relation to a ves-

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transaction, concerning property, agree to stand in the shoes of another, as to any loss which may result to that other, in case a measure of this sort should be adopted by the government. The effect of an interest created in one man by such a contract, in opposition to the measure itself, is too remote, as to its influence upon the conduct of the government, to be regarded. If a contract can be avoided, because it may possibly become the interest of one of the parties at some future day, to oppose the passage of a law, which may then be thought beneficial to the state, it is not easy to foresee all the consequences of such a principle; because, there is no supposable subject concerning which a contract may be made, which may not, at some time or other, become also a subject of legislative consideration; and it can seldom happen that any interference of the government, in relation to that subject, will be equally beneficial to both parties. In the case of *Hadley vs. Clark*, the contract of affreightment raised as strong an interest in the ship owner in opposition to the embargo, as if he had bound himself to indemnify the freighter against it. Yet this circumstance was not even thought of by the counsel, who argued in opposition to the obligations of the contract. In *Touting vs. Hubbard*, 3 Bos. and Pull. 291, which respects the embargo laid by Great Britain on Swedish vessels, Lord Alvanley declares, in the most unqualified terms, that a common embargo does not put an end to *any contract* between the parties, but that it is to be considered as a temporary suspension of it only; and that the parties must submit to whatever inconveniences may arise, *unless they have provided against it by the terms of their contract*. He goes on to state the principle of *Hadley vs. Clark* to be, "that an embargo is a circumstance against which it is equally competent to the parties to provide, as against the dangers of the sea." Now, it is apprehended that in this case, the effect of the American embargo is provided against by the general terms of the policy, and these cases declare explicitly, that such a provision is lawful. Neither is it

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perceived by the Court, that an insurance against a domestic embargo, has a tendency to induce a violation of the law, in case it should be enacted. If the insured be at liberty to abandon, and to recover his indemnity, every temptation to a breach of the law, to which he would have been exposed, if not insured at all, or if he were not at liberty to abandon, is taken away. If he were even bound by a warranty to depart, by a certain day, still it could not be his interest to violate the embargo; because, by so doing, he would lose the benefit of the policy, as certainly as he would have done by not complying with the warranty, and would stand precisely in the situation of one who had not insured at all. Upon general principles, therefore, the Court is satisfied that such a contract would infringe no rule of law, and would in no respect be inconsistent with the sound policy of the nation. We agree with Lord Alvanley, "that there is no great reason, why one British subject may not insure another against the effects of an embargo laid on by the British government: that the policy of the state is not concerned in preventing such an insurance." 3 Bos. and Pull. 291. We cannot, however, yield our assent to the hypothesis started by this learned Judge, and which was strongly pressed upon us by the counsel for the defendants in this cause, by which the individual is identified with his government, in order to expose him to the rule of law, that he, who, by his own conduct, prevents the fulfilment of a contract, shall not take advantage of a nonperformance on the other side. The doctrine is too refined to be safely applied to the common transactions between man and man. Were we to follow its light, it would probably lead us too far from those legal and practical principles, in relation to questions upon contracts, which the wisdom of ages has matured.

A short examination of the authorities cited by the defendants' counsel, will close this opinion.

The general proposition laid down in Salk. 198. Rolla. Ab. 451. Dy. 28. 1 Ld. Ray. 321. 1 Mod. 169, and some other

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books, that wherever a contract is lawful when made, and a subsequent statute makes it unlawful, the contract becomes void; has been already noticed, and the distinction taken between a contract declared to be illegal, and one, the performance of which is only suspended. The quotation from Park, 234, does not support the point contended for by the defendants' counsel; that a domestic embargo puts an end to a contract of insurance previously made and in operation. If it did, that author would contradict an opinion which he had before expressed. In the pages referred to, he obviously alludes to an insurance made, pending an embargo, as is manifest from the case of *Defmada vs. Motteux*, which he cites in support of the principle.

The case of *Kellner vs. Le Mesurier*, 4 East, 396, decides only, that an insurance against capture, generally, does not include a capture as prize by the government of the country where the policy was made, for a reason before acknowledged to be a sound one; because such an engagement, *eo nomine*, would be illegal, being obviously repugnant to the interest of the state. It is for a similar reason that a policy is void, if war should afterwards take place between the respective countries of the assurer and assured.

The case of *Lacausset vs. White*, 7 T. Rep. 535, is certainly very strong. 2 Esp. Cas. 631, was looked at by the Court, with a view to discover the ground upon which the wager in that case, was admitted by the counsel to be illegal. We agree with Lord Kenyon, in the general proposition, that a wager, or a contract of any kind, cannot support an action which is contrary to the policy of the state; but we are compelled to differ from him in the application of the principle to that case. *Allen vs. Hearn*, 1 T. Rep., and *Cotton vs. Thurland*, 5 T. Rep. 405, are referred to in the *nisi prius* report of that case. The first was the case of a wager between two voters, as to the success of the respective candidates of each; and every person must yield his assent to the reasons assigned by Lord Mansfield, against the

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validity of such a wager. The latter case was a wager upon a boxing match, the illegality of which cannot be questioned. It will be found very difficult, we think, to reconcile the principle admitted in *Lacausset vs. White*, with that laid down in *Jones vs. Randall*, Cowp. 37. There is, however, this difference between the former case, and that now before the Court. That is a mere gambling contract, nor could any injury arise to either party, by declaring it void. This is a contract of indemnity, against a real loss of property, which a certain measure of government might produce.

Upon the most mature consideration which it has been in the power of the Court to give to this cause, we think, that upon legal principles, upon the reason and policy of the thing, and upon a fair construction of the contract, the plaintiff is entitled to recover for a total loss.

Goldhawk vs. Duane.

GOLDHAWK, EXECUTOR OF NELSON, vs. DUANE.

Twenty years creates a presumption of payment of a bond, if no interest has been paid in that time. If a shorter period is relied upon, the presumption should be fortified by circumstances.

Nothing beyond the penalty of a bond can be recovered, but if more can be given, the damages are in the discretion of the jury, who are not bound by the rule of the contract; and, therefore, may give less than the legal, or agreed interest.

DEBT on a bond for twelve hundred Sicca rupees, in the penalty of two thousand, executed at Calcutta in 1792, at twelve per cent. interest, payable in twelve months. On the 30th of December 1794, the defendant published a notice in a Calcutta newspaper, addressed to his creditors, requiring them to bring in their accounts against him by the next day, as he was under compulsion to leave that place for England; and declaring that all accounts not so presented, would be considered as barred. The defendant, some time afterwards, but when was not proved, came to this country, where he has ever since resided. The testator lived not in Calcutta, but somewhere in the country, nor does it appear when he died, but probably in 1804, as the plaintiff then qualified as his executor. It was proved by one witness, that after he received from the plaintiff this bond to collect, he called upon the defendant for payment, who required time to examine his papers, stating, that he had some notion he had discharged it. He called again in about three months, when the defendant said he could find no offset against the bond, and would pay it cheerfully, if it were in his power.

Payment was pleaded, and the defendant relied upon length of time, as presumptive evidence, to support the plea.

The plaintiff demanded the penalty, which, at fifty cents the-

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rupee, amounted to one thousand dollars, with twelve per cent. interest, amounting to about eleven hundred dollars.

The Court stated to the jury, that even if the circumstance of the parties residing in different countries, was not of itself sufficient to repel a presumption of payment, and particularly at so great a distance as in this case, still, the acknowledgment by the defendant, was certainly sufficient. In common cases, twenty years creates a presumption of payment, if no interest has been paid in the mean time. If a shorter period is relied upon, the presumption should be fortified by circumstances; but in this case, the circumstances were all the other way, and repelled the presumption.

As to the claim of interest, it was the opinion of the Court, that nothing beyond the penalty could be recovered; but as the plaintiff's counsel appeared very confident that the law was otherwise, and had been so considered and acted upon in the Courts of this state, the Court left it to the jury to find interest, in the name of damages, with a view to the discussion of the point, on a motion for a new trial. But the Court stated, that if more could be given, the damages were in the discretion of the jury, who were not bound by the rule of the contract, and that, therefore, they might give less than twelve per cent.

The jury found one thousand dollars debt, and three hundred and sixty-two dollars damages.

Pagan et al. vs. Sparks.

PAGAN ET AL. ASSIGNEES OF JOHNSON, A BANKRUPT, vs.
SPARKS, AND THE EXECUTORS, AND DEVISEES OF LLOYD.

Sparks & Lloyd being indebted to Johnson & Smith, assigned a mortgage to them in payment, it being understood that the assignors were not to be answerable for the title of the mortgagor to the mortgaged premises. Smith died, leaving Johnson his surviving partner, who became bankrupt, and the plaintiffs are his assignees. They filed a bill, stating that the mortgagor had no title to the mortgaged premises, and that he was a bankrupt, which was known to the assignors, and concealed at the time of the assignment.

Upon a demurrer to a bill, every part of it must be taken as true.

The complainants are the proper persons to ask the relief sought for by the bill, which is to obtain payment of the original debt due by the defendants, notwithstanding the assignment of the mortgage.

The representatives of a deceased partner need not be made parties to a bill filed by the surviving partner, as they have no claim until the partnership debts are paid, and then it is upon the surviving partner, or his representatives.

It is no objection to the bill, that it does not contain an offer to reassign the mortgage. The Court will order this to be done in their decree, if they deem it necessary.

THE bill states that Johnson & Smith carried on business as partners, under the firm of Johnson, Smith, & Co., the former living in London, and the latter in New-York. That Johnson shipped, at different times, to Smith, large cargoes of goods, part of which Smith sold to Lloyd & Sparks, a mercantile house in Philadelphia, in January 1798, to the amount of twenty thousand five hundred and forty-four dollars; of which ten thousand dollars were paid; and in discharge of the balance, Lloyd & Sparks, on the 26th of January 1798, assigned one equal moiety of a mortgage, executed to them by one Dickerson, to Smith, his heirs, executors, &c., with exceptions of certain parts, in

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which Smith stipulated to take said assignment at his own risk, without any responsibility on the part of Lloyd & Sparks for the payment of the debts secured by said mortgage, and assigned to said Smith, it being understood between the parties, that the said Lloyd & Sparks were not to be responsible for any part of the premises thereby granted. This mortgage was given by Dickerson, to secure the payment of five bonds due from Dickerson, but the principal of the two assigned to Smith, and secured by said mortgage, amounted to ten thousand dollars. The exceptions in the assignment refer to particular tracts of the mortgaged premises. The bill charges that Dickerson had no title to the lands mentioned in said mortgage, or if any, only to a small part of very little value; and that Lloyd & Sparks when they executed the assignment, were well acquainted with that circumstance, but concealed it from Smith, who supposed the title to be good. That before either of the bonds assigned to Smith became due, Smith died, leaving Johnson his surviving partner. In January 1799, Johnson became bankrupt, and the plaintiffs were regularly appointed his assignees in England. That about the close of the year 1797, Dickerson became insolvent, which Lloyd & Sparks well knew, and in 1798, he was regularly declared a bankrupt under the laws of the United States; and that his estate will not pay the expenses of the commission. In November 1798, Lloyd died, leaving the defendants, (except Sparks,) his executors and devisees. That Sparks has become insolvent, and unable to pay the complainants' demand. The prayer is, that the executors and devisees of Lloyd, may be decreed to pay, and for general relief.

Sparks demurs, and assigns for cause, that the bill does not show a title in the complainants under Smith, to the said mortgage, premises, and bonds.

WASHINGTON, Justice. (Peters, absent.) This demurrer cannot be sustained. Every part of the bill must, for the present, be considered as true. The debt now sought to be reco-

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vered, was originally due to Johnson & Smith; and, if the transactions which are now impeached on the ground of fraud, had not occurred, the representatives of Johnson could alone have maintained a suit at law to recover the debt. But, under all the circumstances of this case, the complainants are without remedy at law, and in equity, they are the proper and only persons who can, on this side of the Court, ask for the relief prayed by this bill, which, in effect, is to put out of their way the assignment to Smith, and to decree payment of the original debt by the representatives of the solvent, but not surviving debtor. They do not claim under, but in opposition to the assignment to Smith; and on this ground, their title, in equity, to the debt, is unquestionable. It was unnecessary to have made the representatives of Smith parties, because they can have no claim, except against the plaintiffs, for any balance which may remain after paying the partnership debts, and until the plaintiffs shall refuse to account for such balance, the representatives of Smith can have no claim, and ought not, unnecessarily, to be pressed into the controversy. Neither is it an objection, that no offer is made to reassign the deed from Lloyd & Sparks to Smith. If this should, in the further progress of the cause, be thought useful or necessary, it can be so ordered by the Court. These last points are noticed, because they were urged in argument, in support of the demurrer, though not stated as causes of demurrer.

Demurrer overruled, with costs, and defendant ordered to answer.

The United States vs. Bowman.

THE UNITED STATES vs. BOWMAN.

Where an indictment for perjury did not state the day upon which the trial took place, and on which the defendant was sworn in the case in which the perjury was alleged to have been committed, the Court arrested the judgment.

THE indictment states, that at a Circuit Court, held for the district of Pennsylvania, at Philadelphia, in said district, on the 11th of October 1808, before the Justices of that Court, a certain indictment was found by the grand jury, then and there empannelled and sworn, to inquire against one J. S. Hutton, mariner, for that, on the 20th of September 1807, a certain schooner, named the *Matilda*, a vessel of the United States, was unlawfully and voluntarily employed in the transportation and carrying of slaves from one foreign place to another, viz. from Bravo, a foreign place, to certain other foreign places mentioned in the indictment; and that the said J. S. Hutton, then and there mate of said schooner, did then and there voluntarily, &c. serve in the capacity of mate on board said vessel, the same being then and there, voluntarily and unlawfully, employed in the carrying slaves from one foreign place to another, against the form, &c.; and the said J. S. Hutton, being in due form arraigned at the bar, in the said Circuit Court, upon the said indictment, pleaded not guilty; and issue being joined, the said J. S. Hutton was thereupon put on his trial, and was in due manner tried, at the said Circuit Court, by a jury, for the said misdemeanor, in said indictment alleged; that at the said trial, so then and there had as aforesaid; W. Bowman appeared as a witness on behalf of the United States, upon said trial, and was sworn, and took his corporal oath, before the said Judges, [again naming them, and stating that they

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had authority to administer the oath,] and being so sworn, the said Bowman, intending to cause the said J. S. Hutton unjustly to be convicted of said misdemeanor, falsely, &c. did depose that [here follows a statement of his evidence, which fully supported the indictment against Hutton;] whereas, in truth and in fact, the said schooner Matilda never did proceed from, &c. [and so denying the whole of the defendant's testimony, and averring its falsity.]

The objections made in arrest of judgment, are, that the time when the offence was committed is not sufficiently averred; that it is not averred, that the testimony given by the defendant was material; and that it is not averred, that Hutton was a citizen of the United States, without which, no offence was committed. Cases cited in support of this objection, 2 Hawk. c. 25, s. 75. 78. 83. 1 T. Rep. 69. 5 Idem, 316. Doug. 193. Cowp. 230. 5 Esp. 259. Cro. El. 149. 7 Mod. 101.

Dallas cited Crown C. Companion, 202. 1 Lill. Ent. 297. 4 Wentw. Precedents, to show, that all that is material is alleged; and he contended, that if the oath appears on the face of the indictment, to have been material, an allegation is not necessary—*aliter*, if you wish to connect the oath with the point at issue. As to the time, it is sufficiently averred—the words “then and there,” in the latter part of the indictment, sufficiently connecting the time of taking the oath, with the 11th October, the time of holding the Court.

WASHINGTON, Justice. The time when the false oath was taken, is not sufficiently alleged. The indictment states, that the indictment against Hutton was found at a Circuit Court held on the 11th October 1808, before Bushrod Washington and Richard Peters; that Hutton, against whom it was found, being in due form arraigned upon the indictment, [not saying when,] pleaded not guilty, and issue being joined, Hutton was put on his trial, [not saying on what day,] and was tried. The “then and

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there," afterwards mentioned as to the evidence of Bowman, plainly refers to the trial, but that has no time to refer to. In the case of *The King vs. Aylett*, the day on which the cause was heard, and when the oath was taken, is expressly stated. In the case of *The King vs. Dowlin*, the indictment stated, that Kimber was tried, on the 7th June, on an indictment, then and there depending against him, and that Dowlin, on said trial, on said 7th June, took a false oath, &c.

For this reason, therefore, the judgment must be arrested.

Queen et al. vs. The Union Insurance Company.

QUEEN & ROBERTS vs. THE UNION INSURANCE COMPANY.

Insurance was effected on the ship *Experiment*, at and from New-York to any ports on the north side of Jamaica, and at and from the same, to New-York, with the usual warranties. The vessel was captured by a Spanish privateer, while proceeding from Falmouth, in Jamaica, to Montego Bay; recaptured by the British, carried back to Falmouth, and afterwards to Montego Bay, where the vessel and cargo were subjected to a salvage of one-eighth; sold, for the payment thereof; purchased by the captain, for the benefit of those whom it might concern; and the vessel, having completed her lading, returned to New-York, subject to a bottomry bond for advances made by the consignee; her outward freight having exceeded the salvage and expenses resulting from the recapture. The insured abandoned, on being informed of the recapture. The Court held, that there was no ground for an abandonment.

A capture as prize, will authorize an abandonment, as soon as notice is received, provided the loss continue to the time when the abandonment is made.

If a recapture is made with a view to salvage, and this does not exceed, with the expenses, one-half of the value of the property, and the recapture produces only a temporary interruption of the voyage, the insured cannot abandon.

If the recapture be as prize; or the voyage be lost, or not worth pursuing; if the salvage be very high; or if further expenses be necessary, and the underwriters will not agree to pay them, the assured may abandon.

WASHINGTON, Justice, delivered the opinion of the Court. This is an action on a policy of insurance, dated the 9th August 1805, on the ship *Experiment*, on a voyage at and from New-York, to any port or ports on the north side of Jamaica, and at and from either or all of said ports, back to New-York. The policy was subscribed by the defendants, to the amount of 10,000 dollars, at a premium of 10 per cent. The policy was in the usual form, and contained a warranty of American property, and free from any charge or loss which might arise in

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consequence of seizure or detention, on account of illicit or prohibited trade.

On the 28th August, the ship sailed from New-York on the voyage insured, with a cargo principally on freight, (12,000 staves, only, being the property of the owner,) for account, in part, of persons at Falmouth, on the north side of Jamaica, and in part for persons at Montego Bay; at which ports the freight for the goods, intended for them respectively, was to be paid. The ship arrived in safety at Falmouth, delivered that part of her cargo which was intended for that port, and received the freight thereon; which, together with the proceeds of the staves belonging to the owners, was invested in rum at 4s. per gallon. The whole amount of this investment was 576*l.* 16s. Jamaica currency. On the 20th of October, the ship left Falmouth, on her voyage for Montego Bay, with the rum so taken in, and the residue of her original cargo; and after having proceeded about five miles, she was brought to by a Spanish privateer, and was taken possession of; but within about four hours afterwards, she was recaptured by a British sloop of war, and conducted back to Falmouth, where she continued, in the possession of the recaptors, until the 3d of November, when she was carried by them to Montego Bay, and arrived there the next day.

From an affidavit, made by the captain and his mates, at Montego Bay, on the 5th of November, it would appear, that some suspicions existed in the minds of the recaptors, that the ship was chargeable with having on board a few parcels of prohibited goods; and the captain seems to have been, at first, apprehensive that proceedings would be instituted against her, on that ground.

On the 7th of November, he wrote to his owners, informing them of his capture and recapture, and stating that, in consequence of some report on shore that the ship had contraband goods on board, she had been searched, but that only three packages of nankeens, belonging to one of the mariners, had

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been found; that, on account of these goods, and three barrels of sugar, also belonging to the same person, the ship had been seized and ordered for Montego Bay, where he was landing the cargo, agreeably to bills of lading. He adds, that he knows not whether the vessel will be condemned for this; that letters from Kingston say she will not, and that such is the opinion of his consignee; but that salvage he will have to pay.

On receipt of this letter, the plaintiffs gave information of the state of the ship to the defendants, on the 27th of November, and offered to abandon; which was not accepted. By subsequent letters, from the captain to his owners, but which had not been received at the time of the abandonment, it appears, that he still entertained some fears as to the condemnation of the vessel, but states that she will certainly be sold, to ascertain the salvage. The vessel and cargo were labelled for salvage, and one-eighth was decreed to the recaptors. They were sold on the 30th December 1805, and were purchased in, at the instance of the captain, by Messrs. Longlands, for the benefit of whom it might concern, for £1000. She completed her lading at Montego Bay, and arrived safe at New-York, under a bottomry bond, given to Longlands, for 1010 dollars, due to him as a balance of his advances. The whole expenses of the vessel and cargo, occasioned by the capture and recapture, including the salvage, was about 2364 dollars. The salvage on the vessel was £98, Jamaica currency. The freight received at Montego Bay, amounted to about £806, Jamaica currency.

Two questions have been made in this cause—First, whether the plaintiffs had a right, on the 27th of November, to abandon, and go for a total loss; and secondly, if so, what part of the outward freight the defendants have a right to be credited with. First. The law respecting the right of abandonment, in a case of capture and recapture, is so intelligibly treated in the three great cases of *Goss vs. Withers*, *Mills vs. Fletcher*, and *Hamilton vs. Mendes*, that it will be only necessary to state

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the principles which they establish, and then apply them to the present case. These principles are, that a capture, as prize, will authorize the insured to abandon, as soon as he has notice of that fact, provided, the loss continues up to the time when the abandonment is made. If the vessel be recaptured by a friend, before the abandonment is made, the right of abandonment may or may not be defeated, according to the circumstances of the case. If the recapture be made, merely with a view to salvage, and this, together with the expenses, do not exceed one-half the value of the vessel, and the recapture is productive of a temporary interruption of the voyage, the insured is not at liberty to throw the whole loss upon the underwriters, by abandoning to them. But if the recapture be with a view to make prize of the vessel; or if, in consequence of the recapture, the voyage be lost, or not worth pursuing; if the salvage be very high; or, if further expense be necessary, and the insurer will not agree to pay it; the insured is at liberty to abandon.

In the case of *Goss vs. Withers*, the captors deprived the vessel of all her men but two; the vessel was so disabled in a storm, that she could not have prosecuted her voyage, without refitting, at a considerable expense; the cargo was spoiled, whilst lying at Milford Haven, in possession of the recaptors; one-half the value was paid for salvage; her charter party was dissolved, and her freight lost. In *Mills vs. Fletcher*, the voyage was completely lost, in consequence of the capture and recapture. But in *Hamilton vs. Mendez*, which was also a case of capture and re-capture, the vessel was conducted by the recaptors to the port of her destination, the insurer offered to pay the salvage, no injury had been sustained by the vessel, and she earned her freight.

In the case before the Court, the vessel was libelled for salvage only, and one-eighth was decreed; the whole outward freight was received, and in possession of the captain, amounting to more than would have discharged the whole salvage, and

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expenses resulting from the capture and recapture. The vessel received no injury, and the consequence of the recapture was a temporary obstruction of the voyage; which it was at all times in the power of the captain to have removed, by applying for a commission of appraisement, instead of inviting a sale, which he obviously preferred, with a view to the interest of his owners, and which it is as obvious he promoted by the measure. We do not think that this case affords one solid reason for throwing this vessel upon the hands of the underwriters.

It was said in argument, by the plaintiffs' counsel, that the recaptors had, at one time, a view to the condemnation of the vessel and cargo, on account of contraband goods, which they suspected were on board; but the argument was not pressed; for, if this had been the fact, the insured would have been estopped from recovering any thing, in consequence of his warranty.

It was also contended, that the sale and purchase by Longlands divested the right of the insured, and in this way a total loss took place. The fact, however, is mistaken. She was purchased for the insured, and Longlands was nothing more than the agent and banker of the captain, who found it more to the interest of his owners to make the purchase with the funds of Longlands, than to sell any part of the cargo.

Upon the whole, we are clearly of opinion in favour of the defendants, upon the first point, which renders the consideration of the second unnecessary.

Judgment for defendants.

Segourney vs. Ingraham et al.

SEGOURNEY vs. INGRAHAM ET AL.

After a rule on the Marshal to return the *capias ad satisfaciendum*, issued against the defendants, and the return of the Marshal, that the plaintiff had directed him not to serve the writ on one defendant, and that the other could not be found; the Court have nothing more to do with the rule.—If the Marshal has misconducted himself, the remedy is an action for a false return.

THIS was a rule upon the Marshal to return the *capias ad satisfaciendum*, issued in this case. Judgment had been obtained against Ingraham and two others. The *capias ad satisfaciendum* issued against all three; and the Marshal now returns, that the plaintiff's attorney directed him not to serve it on *Ketland*, one of the defendants, he having paid his part, and been released; and that another of the defendants could not be found.

Morgan, for the plaintiff. Ketland was not released. He paid part of the judgment, and a receipt for so much on account was given. Of several defendants, the plaintiff may direct the writ to be executed on which he pleases.

Dallas, for defendants. The plaintiff has no right to instruct the officer how to execute his writ—to serve on some, and not on others. On a *capias ad satisfaciendum* against two, if one is taken and discharged, it discharges the other. 4 Dall. 275. There is no difference between that case, and one where the officer is instructed by the plaintiff to serve on one, and not on the others.

By the Court. The writ is returned, and of course the plaintiff has obtained the effect of his motion. If the Marshal has misconducted himself, in not having served the writ, or has made a false return, the plaintiff can take his remedy. But, on the present rule, we have nothing further to do.

Bryan et al. vs. M'Gee, Administrator.

BRYAN ET AL. vs. JAMES M'GEE, ADMINISTRATOR OF
DAVIS M'GEE.

Davis M'Gee was indebted to the complainant, and after his decease, administration was granted to his effects in New-Jersey, to James M'Gee, the defendant, who, in his answer, stated that he had administered all the effects of the deceased, except 760 dollars, which he was ready to distribute; but claimed that he could be called upon to settle his administration account, only in the state of New-Jersey.

The Court held, that the defendant, having stated that he had property in his hands, might be called upon, *in Equity*, to account for that property, anywhere.

THE bill charged, that Davis M'Gee, deceased, became indebted in his life to the plaintiffs, for goods sold, and gave his promissory note therefor; that he died, and that James M'Gee, a citizen of New-Jersey, the defendant, took out letters of administration in New-Jersey, and became possessed of all his property; that he pretends he has fully administered, but that the goods purchased by Davis M'Gee from the complainants were sold by him to the defendant; but that such sale was merely colourable, and a fraud between the two M'Gees; that notwithstanding the pretended sale, they remained the property of Davis, and from them the defendant has funds enough of the intestate to pay the debt due to the complainants.

The defendant demurred, pleaded, and answered.

The ground of demurrer was, that as the bill stated the defendant to have taken out letters of administration in New-Jersey, he could be called upon as administrator, and to settle his administration accounts, only in that state.

The plea stated, that the complainants had cited the defendant before the Orphan's Court in New-Jersey, where the very point of fraud, now alleged, had been tried, and decided in his, the defendant's, favour.

Bryan et al. vs. M'Gee, Administrator.

The answer denied all fraud; stated that the deceased was in his lifetime indebted to the defendant, and sold him the goods, *bona fide*, in discharge of the debt; that the question of fraud, now alleged, had been twice tried, and decided in favour of the defendant; that he had administered all the effects of the deceased, except 760 dollars, which he is ready to distribute according to the laws of New-Jersey.

After argument, by Dallas, for complainants, and Ingersoll and Reed, for defendant—

By the Court. The demurrer must be overruled. The defendant, having property in his hands belonging to the estate of Davis M'Gee, may, *in Equity*, be called upon for that property in any place. But upon the plea, (which already stands for an answer) and the answer, it is the opinion of the Court, upon the merits, that the complainants are entitled to a decree for the amount of assets admitted by the defendant to be in his hands. As to the goods charged in the bill to have been unfairly obtained from the intestate, the whole weight of evidence is in favour of the defendant. The answer is not only not contradicted by evidence, but is strongly supported.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, OCTOBER TERM, 1809.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the
 { Supreme Court.
 { Hon. RICHARD PETERS, District Judge.

CRUDER vs. THE PENNSYLVANIA INSURANCE COMPANY.

Although the unseaworthiness of the vessel, occasioned by want of men, at the time the *risk commences*, may not vacate the policy, provided she is seaworthy when the voyage commences; yet she cannot go out of her course, after the commencement of the voyage, to supply such want.

It is not an excuse for a deviation, that there was a sufficient number of hands to navigate the vessel to a port, where the necessary addition to the crew could be obtained for the whole voyage; such port not being in the course of the voyage, and the want of hands existing before the commencement of the voyage insured. The vessel should be fitted for the voyage insured, at the time of her departure.

THIS case (see ante, page 262,) was tried again this Court, and argued upon the same evidence, much as on the former trial; except that on the part of the defendant, it was contended that it did not appear by any evidence in the cause, that the loss of the mate and men took place after the cargo was taken on board, and consequently while the property was at the risk of the underwriters.

The plaintiff's counsel insisted, that the brig was sufficiently manned at the time she left St. Lucia, to go to St. Bartholo-

Cruder vs. The Pennsylvania Insurance Company.

mew's, though not for the whole voyage, which was sufficient; and, besides, that the report in New-York, that she was going to St. Kitt's to get hands, was communicated to the underwriters when the order for insurance was given.

WASHINGTON, Justice, charged the jury. When this case was formerly tried, the Court stated to the jury, that if the accident happen while the property was at the risk of the underwriter, and cannot be repaired at the port of her departure, the vessel may go to the nearest port where the damage can be repaired, without prejudice to the insurance; and that, in doing so, the case is the same as if she had repaired at the place of departure. The deviation is as excusable, as if the accident had happened during the voyage. To this opinion the Court adheres. But, at that time, considering the fact agreed, that the loss of the men, in this case, did occur after the risk commenced, nothing was said by the Court, as to the law, in case the want of seaworthiness existed at the time the risk commenced. As to this, it is our opinion, that though the want of seaworthiness at that time may not vacate the policy, provided she is seaworthy at the time the voyage commences, yet the vessel cannot go out of her course to supply such want. As if at the time the cargo is taken on board, or the risk in other cases commences, the vessel is not sufficiently manned, she may afterwards, and before the voyage commences, supply that want, yet she cannot excuse a deviation for the purpose of procuring hands.

The Court cannot yield its assent to two propositions laid down by the plaintiff's counsel. First, that the want of seaworthiness for the voyage forms no objection, if she was seaworthy to the port to which she deviated, and afterwards for the residue of the voyage. The answer is, that the deviation itself, in such case, is without excuse, because she ought to have been fitted for the voyage at the time of her departure, unless prevented by an accident, occurring after the risk com-

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menced. Secondly ; that the defendants had notice of the want of hands, before the insurance was made. But the report stated to the underwriters, as prevailing at New-York, that there was a deficiency of hands, was accompanied by the additional circumstance that this want was to be supplied at *St. Kitt's*, which was not true. The notice, therefore, amounted to nothing, unless in fact she had gone to *St. Kitt's*. Upon this point, then, the jury must be satisfied that the loss of the men happened after the risk commenced, or otherwise the deviation to *St. Bartholomew's* cannot be excused. If they are satisfied upon that point, in favour of the plaintiffs, they will then inquire whether, upon the evidence in the cause, *St. Bartholomew's* was the nearest port at which hands could be procured; and in deciding this point, some allowance ought to be made for the reasonable discretion which the captain, (though the agent of the owner,) is permitted fairly to exercise.

OLIVER EVANS vs. JOHN WEISS.

Construction of the Act of Congress, passed the 21st of January 1808, entitled "An Act for the relief of Oliver Evans."

The general law of patents declares, that the right to the patent belongs to him who is the first inventor, even before the patent is granted; and, therefore, any person, who, knowing that another is the first inventor, yet doubting whether he will apply for a patent, constructs a machine invented by another, acts at his peril, and a subsequent patent will prevent his use of the machine thus erected.

THIS was an action on the case, for a violation of the plaintiff's patent right, and comes on upon the following case agreed. The plaintiff being the inventor of the improvements in the manufacture of flour, hereafter mentioned, and the patent right for the same, by him heretofore obtained, having been declared by this Court void, in the action of the said Evans against Chambers, and the time for which the said patent was granted, having also run out, an Act of Congress, entitled, "An Act for the relief of Oliver Evans," was passed on the 21st of January 1808, in consequence of which, the said Evans duly obtained letters patent, bearing date the 22d of January 1808, notice whereof was given to the defendant, in February last.

On the 7th of May 1809, during the continuance of the former patent, the defendant purchased of the plaintiff, a right to use the said improvements at his mill on Wissahicon creek, in Philadelphia county, in this district, for one wheel and pair of stones; but prior to the passing of said Act of Congress, he had applied and used, and still continues to apply and use the same improvements for two wheels and two pair of stones in the same mill. The question submitted is, whether the defendant

Evans vs. Weiss.

is liable for damages for the use of said improvements, in their application to this second wheel and pair of stones, since the Act of the 21st of January last ; and whether, if so, he is liable before notice from the plaintiff. If the opinion be in favour of the plaintiff, judgment to be entered generally, and the amount to be afterwards adjusted by the attorneys.

WASHINGTON, Justice, delivered the opinion of the Court. It is contended by the plaintiff, that the defendant is liable for using the plaintiff's improvement, in application to the second wheel and pair of stones, since the 22d of January 1808 ; or, at all events, since the time when the defendant received notice of the plaintiff's patent ; because the proviso in the Act, passed on the 21st of January 1808, "for the relief of Oliver Evans," extends only to cases of improvements erected for use, or used prior to the passage of that law, and does not protect the defendant from damages for using, after the issuing of the patent under this law, an improvement erected prior thereto. On the other side, it is insisted that such a construction would render this an *ex post facto* law, and consequently repugnant to the constitution. To avoid which, it should be so construed, as to connect with the use of the improvement, the erection of it subsequent to the grant of the patent.

Although the Court at the last term, and upon the first argument, felt strongly inclined to give it the construction contended for by the defendant, yet, upon further reflection, we are satisfied that we should do a violence to the words, which no rule of construction would warrant. The words of the proviso are, "Provided that no person, who shall have used the said improvements, or have erected the same for use, before issuing said patent, shall be liable therefor:" that is, shall be liable for having erected, or for having used the improvement at any time prior to the patent. But with respect to the use of it after the issuing of the patent, no protection whatever is afforded against the claim for damages under this law.

The next inquiry is, does the *general law* give to the plaintiff a right of recovery, against a person who erected a machine, prior to the issuing of a patent to the first inventor of it, and who afterwards made use of the same?

The Act of Congress, of the 17th of April 1800, which, as to this point, is the only law in force, declares that if any person, without permission from the inventor, shall make, devise, use, or sell the thing, whereof the exclusive right is secured to the patentee, he shall pay three times the damages sustained by the patentee, to be ascertained by a jury. Now, whatever doubt might have existed as to the meaning of the words "devise and use," in the fifth section of the Act of the 21st of February 1793, thus connecting the using, with the devising of the improvement; there can be none under the third section of the Act of 1800, which repeals the whole of the fifth section of the old law. It is plain, that the *using* of an improvement invented by another, and secured by patent, is of itself an offence, no matter at what time such improvement was devised or made. Whether the word *devise*, which has been a good deal criticised, is synonymous with *make*, as Mr. Rawle seemed to think it is, or means to *invent*, a mere act of the mind, which we deem very unreasonable, or to *contrive, plan, form, or design*, it is unnecessary in this case to decide, because the charge against the defendant, is the *using* of the plaintiff's improvement, unconnected with the making or devising it.

But it is objected to this construction, that it would render the law *ex post facto* in its operation, in respect to one who has erected this improvement, prior to the grant of the patent to the plaintiff.

It must be admitted, that cases of great hardship may occur, if, after a man shall have gone to the expense of erecting a machine, for which the inventor has not then, and never may obtain a patent, he shall be prevented from using it by the grant of a subsequent patent, and its relation back to the patentee's

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prior invention. But the law in this case, cannot be termed *ex post facto*, or even retrospective in its operation; because the general law declares, beforehand, that the right to the patent belongs to him who is the first inventor, even before the patent is granted; and, therefore, any person, who, knowing that another is the first inventor, yet doubting whether that other will ever apply for a patent, proceeds to construct a machine, of which it may afterwards appear he is not the first inventor, acts at his peril, and with a full knowledge of the law, that, by relation back to the first invention, a subsequent patent may cut him out of the use of the machine thus erected.

Not only may individuals be injured by a literal construction of the words of the law, but the public may suffer, if an obstinate or negligent inventor should decline obtaining a patent, and at the same time keep others at arm's length, so as to prevent them from profiting by the invention for a length of time, during which the fourteen years is not running on. But all these hardships must rest with Congress to correct. It is beyond our power to apply a remedy.

No such hardship exists in this case, where the defendant erected this improvement, with a knowledge not only that the plaintiff was the first inventor, but that he had absolutely obtained a patent, although it was afterwards declared invalid.

Upon the point of notice, we think, that the Act of 1808, being a private one, the defendant is liable only from the time he received notice of the law.

Judgment for plaintiff.

NOTE.—In the case of Evans vs. Jordan, February Term 1815, the Supreme Court unanimously affirmed the construction given, in the above opinion, to the Act of January, 1808. The question of notice did not come up. Cranch's Reports, Vol. ix. p. 199.

Hart et al. vs. The Delaware Insurance Company.

HART, VANDYNE, & PATTERSON vs. THE DELAWARE INSURANCE COMPANY.

Insurance on the freight of the Hannah, at and from New-York to Wilmington in North-Carolina, and thence to Barbadoes, and back to Philadelphia. At Wilmington, a cargo was prepared to be shipped in the Hannah, had she arrived there. The vessel was forced, by stress of weather, to put into Norfolk, and arrived there in a state of wreck. The agent of the plaintiffs gave notice to the defendants' agent at Norfolk, and requested him to have all the repairs made that were necessary; which he declined. The repairs would have cost upwards of 3000 dollars, at which sum the vessel was insured. The plaintiffs offered to abandon, and the vessel was sold for 325 dollars.

If the injury which the vessel sustained, exceeded one-half of her value, the insured had a right to abandon, unless the underwriters would agree, *at all events*, to pay for the repairs, though they should exceed what they were liable for, if only a partial loss had taken place.

The underwriters are not bound to make or direct the repairs, in any case; but if the injury sustained exceed one-half the value of the vessel, and if the underwriters would prefer the voyage being prosecuted, they must engage to pay what will be necessary to fit her for the voyage, though it should exceed the sum underwritten.

The refusal of the agent of the defendants to pay for such repairs only, as the defendants were liable for, and not for all the necessary repairs, authorized the abandonment.

Risk is the subject of the contract of insurance, and until the risk commences, the contract does not attach.

Generally, an inchoate right to freight does not commence until the cargo is put on board; but if the freight is insured in a valued policy, the right to indemnity attaches, if any part of the cargo is shipped.

If the insured, in virtue of a contract with a third person, has an inchoate right to freight as soon as the voyage commences, although before the cargo is taken in, there the risk commences, and the policy attaches, in virtue of the contract, as soon as the voyage commences.

Hart et al. vs. The Delaware Insurance Company.

ACTION on a policy of insurance, dated 3d September 1806, on freight of brig *Hannah*, at and from New-York to Wilmington in North-Carolina, at and from thence to Barbadoes, with liberty to go to another British island, at and from thence to the city of St. Domingo, there, and at the usual loading places on the coast, and after completing her cargo, to return to New-York. The usual memorandum was at the foot, which proceeded to state, that it was understood the vessel was insured, in and out of port, during the whole voyage. The policy, as to the printed part, was the common form of a policy on cargo, but at the foot was declared to be on freight: 2000 dollars was subscribed, at a premium of 11 per cent. The same defendants also underwrote policies on the vessel and cargo, at the same premium. The order of insurance stated, that the cargo was to be taken on board at Wilmington.

It appeared in evidence, that the brig, on the 25th of August, sailed on the voyage insured, but was so injured by tempest on the coast, that she was obliged to cut away her masts, and got into Norfolk, a wreck, about the middle of September.

The defendants having an agent at Norfolk, (viz. Mr. Granberry,) the plaintiffs' agent (Mr. Myers) applied to him to have the vessel repaired. It appeared, from the testimony of Myers, that Granberry refused to have all the repairs made that were necessary, and also refused to agree to pay for the whole that might be made, although he consented to pay for the repairs in part.

About the middle of December, Myers wrote a note to Granberry, calling upon him to have the necessary repairs made, or to direct what repairs should be made, and to agree to pay Myers all such sums of money as he should expend in the repairs, and in supplying the wants of the captain. In answer to this note, Granberry declined making the repairs himself, but consented that Myers should have such as are usually made, and promised to pay whatever sum the defendants may

Hart et al. vs. The Delaware Insurance Company.

be liable to pay. It was proved by a Mr. Williamson, a shipwright, that he was directed to repair the vessel, and that he went on board to do so; but that the captain refused to allow him, saying that Myers had spoken to another shipwright to do it. The vessel was about fourteen years old, her tonnage 146, and it is stated by the witnesses that her repairs would have cost upwards of 3000 dollars. She was insured at that sum. On the 1st of January, the plaintiffs offered to abandon, which was refused. The vessel was sold as she lay, at public auction, for 325 dollars. It was proved, that a cargo of staves was provided, and was waiting for her at Wilmington, which, after the loss of the vessel, were sold at a small loss. Had she performed the voyage, she would have earned a freight equal to the sum insured.

The recovery was resisted, upon the following grounds—First. That there was not a total loss. It was the duty of the owner to repair his vessel, to enable her to earn her freight; and the insurers were not bound to repair, or to direct what repairs were to be made, or to bind themselves to pay for them. But if they were so bound, they had agreed, by their agent, to do all that could legally be required, viz. to make usual repairs, and to pay what they were legally bound to pay. Besides which, they offered to make the repairs, and were refused by the captain. Marsh. 2d ed. 488. 582. 1 John. N. Y. Rep. 321. 205.

Second. There was no inception of this risk, and consequently the policy never attached. The plaintiff had not an insurable interest, until the cargo was taken on board. Marsh. 2d ed. 278 to 280. 323. Abbot. 203. If it be contended, that wager policies are allowable in this country, which may well be questioned, still they should upon their face appear to be so, as interest or no interest, free of salvage, &c. Park, 239.

Third. The loss was treated as a partial loss, for three months; and it was then too late to abandon.

On the other side, it was contended, that the loss was total: when the vessel got to Norfolk, the repairs amounting to more

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than half the value of the vessel. Where this is the case, the insurer must agree to pay for the repairs at all events, if he would prevent the insured from abandoning. *Goss vs. Withers*, 2 T. Rep. *Dacosta vs. Newman*.

Second. Under all the circumstances of this case, the contract between the parties amounted to an agreement that the risk should commence with the commencement of the voyage; in which case, it does not differ from a charter party. 6 T. R. 478. 7 East, 400. Park, 267. 2 East, 544. 3 T. R. 362.

Third. No abandonment is necessary, upon a policy on freight. 3 Bos. & Pull. 310.

WASHINGTON, Justice, charged the jury. The first question is, was there in this case a total loss? It is strongly to be presumed, from the age of the vessel, her tonnage, the cost of her necessary repairs, and the price at which she sold, that the injury to be repaired would have exceeded more than half her value; but of this, you are to judge. If this was the fact, the insured had a right to abandon, unless the underwriters would agree, at all events, to pay for the repairs, although they should exceed what the underwriters would have been answerable for, if only a partial loss had happened. It is true, that the underwriter is not bound to make, or to direct, the necessary repairs, in any case. But if the injury sustained is such that the insured may turn it into a total loss, the underwriter, if he would prefer the voyage being prosecuted, must engage to pay what may be necessary to fit her to prosecute the voyage, though it should exceed what otherwise he might be liable for.

The question then is, did the agent of the underwriters agree to answer for such repairs? Mr. Myers declares, that he would only consent to pay for partial repairs; and it appears, by his answer to Mr. Myers' note, that he would only agree to pay what the underwriters were legally bound to pay. But the underwriters were not bound to pay beyond their subscription, and the repairs would have cost between three and four thou-

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nd dollars. The insured, therefore, was not bound to make ose repairs at his own risk, and was consequently at liberty treat the loss as total, unless you should be satisfied, by Williamson's evidence, that whatever difference may have isen between Myers and Granberry, the latter did consent to pair the vessel, and would have done so, had he not been evented by the captain. If Williamson is believed, it is rtainly very difficult to account for, and still more so to justify, e conduct of the agents of the insured upon this occasion, refusing a compliance with their own proposition; and if ou are satisfied that this offer was made, and a willingness own to carry it into effect, the plaintiffs had no right to turn is into a total loss. You are alone proper to decide how this ct was; and, having satisfied yourselves respecting it, you ill find no difficulty in applying the law to it, as the Court has ated it to you.

The next question is purely a point of law. Had the plain-ffs an insurable interest, before or at the time when the loss ppened, as stated by one of the counsel; or, had the risk en commenced, as it is put by another? There is no difference between them. Risk is the subject of the contract of insurance. If there be no risk, there can be no contract. Until e risk commences, the contract does not attach. If the insured cannot or will not commence the risk, he has no claim to demnity, and the underwriters cannot retain the premium.

In an interest policy, there can be no risk, if there be no interest. The risk, then, can only commence when the interest mmmences—which leads to the question, when does an inchoe right to freight commence? The answer is, when the goods e put on board. This is the general rule, as laid down in the use of *Tonge vs. Watts*, which, I believe, has never been ectioned. It is true, that if the policy be valued, the right indemnity attaches, if only a part of the cargo is taken on ard, and then a loss happens; because, in such a case, it-is ily necessary to prove some interest, to entitle the insured to

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Lessee of Copley vs. Riddle.

was not overlooked by the Court, as influencing the doctrine laid down in that case.

The plaintiff suffered a nonsuit.

NOTE.—In this case, the doctrine of prior possession, giving a right to recover in ejectment, was mentioned, but though not decided, was discountenanced by what fell from the Court. In support of the doctrine, Vaughan, Cro. El. 2 Saund. 111. 1 Hawk. P. C. 64. 154. 16 Vin. 467, pl. 2, were cited.

The United States *vs.* Price's Administrator.

THE UNITED STATES *vs.* PRICE'S ADMINISTRATOR.

A commission, which had been executed and returned, was set aside, because it had been opened by one of the officers of the government, before it came into the hands of the clerk.

RULE to show cause why the commission for taking depositions should not be accepted as duly returned, or be sent back for a more regular return. The commission, in consequence of a misdirection of it by the commissioners, had been opened first by the Secretary of War, and afterwards by some other officer of the government, before it came to the hands of the clerk of the Court.

By the Court. This rule was granted on account of the irregularity in opening the commission, as to which there is no doubt. If the objection had been to the execution of it, the rule would not have been granted. Let it be set aside. Issue a new commission, to which the original papers attached to the old commission, may now be annexed.

Marshall vs. The Union Insurance Company.

MARSHALL vs. THE UNION INSURANCE COMPANY.

The vessel insured was captured on her voyage to Carthagena, and condemned on the ground of illicit trade, a part of the cargo having been brought from Spain to New-York by a Spaniard, entered for exportation, and afterwards sold to the plaintiff, the Spaniard going out as passenger on board the vessel, and the transaction being considered by the British Court of Admiralty as illegal, deeming it a trading between the mother country and her colony.

If the jury considered that the assured was guilty of concealment of the shipment of the goods of Spanish origin, then the policies effected by the plaintiff will be void, for the taint of part of the cargo would occasion a seizure, detention, and expense, and give the assured a right to abandon.

The assured is not bound to anticipate every possible ground of suspicion which may, against right, weigh with the belligerent cruisers and Courts, and to communicate the circumstances; although, if against right, the belligerent Courts are in the habit of condemning property under particular circumstances, he should disclose the circumstances, if they exist, that the underwriter may know how to estimate the risk.

THIS was an action on four policies, one on the vessel, another on the freight, a third on the cargo, and a fourth on an additional cargo, effected in October 1806.

The additional cargo consisted principally of goods brought by a Spaniard from Cadiz to New-York, and entered for exportation for the benefit of drawback. These goods were afterwards sold by the Spaniard to one Casanova, recently, before they were reshipped, and sold by Casanova to the plaintiff. The policies contained the usual warranty of neutral property, to be proved here, and against illicit or prohibited trade. The defendant was informed that five Spaniards, with passports, were to go passengers in this vessel to Carthagena, but that any part of the cargo had been brought by one of those passengers from

Marshall vs. The Union Insurance Company.

Spain, and had been recently sold by him to the plaintiff, was not disclosed. The vessel and cargo, after having had her papers taken away at sea by a British vessel, was again detained by another British vessel, carried into Jamaica, and condemned. The whole record was read, not as containing evidence, but to show the ground of condemnation.

The objections to the recovery were, first; that there were strong circumstances in the case, to show that the sale by the Spaniard was not *bona fide*, and that the apparent sale was as a cover; and, secondly, that the circumstance of part of the cargo having been brought from Spain, and recently sold by one of the passengers, ought to have been disclosed to the defendants. Three presidents of insurance offices were examined, and they all gave it as their opinion that those circumstances were material. Two of them said, that a disclosure of them would have increased the premium. The third said, that it would have led him to inquire into the fairness of the transaction; but that, if he had found it *bona fide*, it would have made no difference with him.

WASHINGTON, Justice, in charging the jury observed— that it was for them to weigh the evidence, and to decide, not upon suspicions, but upon such circumstances as ought to influence a correct mind, whether the sale was *bona fide*, or not. If not, it was a fraud upon the neutrality of the United States, as well as upon the defendants, and amounted to a breach of warranty in the policy on these goods. That if the jury should be satisfied upon this point against the insured, it would be sufficient to avoid all the policies upon the ground of concealment, because, although the taint upon part of the cargo would not, or ought not to have caused a condemnation of the other parts, or of the vessel, yet it would necessarily occasion a seizure, detention, and expense, if not danger to the whole, and would, at all events, give a right to the insured, on hearing of the capture, to abandon. The insurer calculates not only the

Marshall vs. The Union Insurance Company.

risk of condemnation, but of capture and detention, and a concealment of circumstances which may produce the latter, must be material to the risk, and would, if known, increase the premium.

c. As to the second point, the jury must inquire for themselves, whether these circumstances were material to the risk, and in making this inquiry, they should carry back their minds to the time when these insurances were effected, without attending to the subsequent capture and condemnation. We are all very wise in finding out the causes which have led to particular events, after the events have taken place; and we are apt to give weight and consequence to circumstances, which would originally have passed unnoticed. Would the circumstances of this case, which were disclosed, have appeared material, in October 1806, to any of these parties? The insured knew, provided his purchase was *bona fide*, that the goods became thereby neutral, and were not liable to condemnation. He also knew, that, in general, it was not necessary for the insured to disclose from whom he had purchased the cargo which he asks to be insured; and he also knew, that according to the law of nations, it was no cause of condemnation, that the vendor was an enemy, and was to be a passenger in the vessel carrying the goods. It might or might not have occurred to him, that these were circumstances, which, with a suspicious Court, or rapacious captors, might lead to difficulty; but we do not know that the insured is bound to anticipate every possible ground of suspicion, which might weigh with some minds, and totally escape the observation of others. If, according to any established adjudications of the belligerent Courts, generally known, certain circumstances become grounds of condemnation, though in opposition to the law of nations, those circumstances, if known to the insured, should be disclosed. So a case may happen, where the circumstances are of such a nature, as to make the danger of capture very great, in which the Court mean not to say, that a disclosure ought not to be made. But it is not every con-

Parker vs. The United States

of the captain stated her to have been built in Nova Scotia. Between the time of her entry and seizure, certain repairs were made to her, and materials furnished, at the request of the captain, by certain persons who filed their petition in the District Court, to be paid out of the sales, in case of condemnation. A decree, *pro forma*, condemning the vessel, passed the District Court, from which an appeal was taken.

The questions made, were, first, whether the vessel is liable to forfeiture in the hands of a *bona fide* purchaser? Cases cited for the United States, 1 Rob. Rep. 115. 274. 2 Idem, 198. 3 Idem, 84, 85. 3 Dall. 6. 4 Cra. 268. On the other side, 3 Cra. 337.

Secondly; are material men entitled to be paid out of forfeited property? On the affirmative were cited 1 Peters's Adm. Rep. 233. 227. Act of Assembly of Pennsylvania, March 1784, giving a lien to such persons. 3 Rob. 84. Dougl. 546. E. Contra. 2 Rob. 195. 1 Peters's Adm. Rep. 237. 2 H. Blac. 607. 1 Rob. Rep. 194. 1 Johns. Rep. 471.

WASHINGTON, Justice. The first and principal question is, are the United States entitled to claim a forfeiture and condemnation of this vessel, for the cause stated in the information? The first embargo law went no farther than to prohibit the sailing of all vessels, from the ports of the United States to any foreign port, except such as might be under the immediate direction of the President, and foreign vessels; and to authorize the President to make use of the navy, for carrying this prohibition into effect. This law also prohibited registered or sailing vessels, having goods on board, from proceeding from one port of the United States to another, without bonds being first given to reland the cargo within the United States. The supplement to this law, which passed soon after, declares, that if any vessel shall, during the continuance of the first Act, depart from any port of the United States, without a permit or clearance, or shall, contrary to the provisions of either Act,

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proceed to a foreign port, or trade with, or put on board of any other vessel, any goods; such vessel and goods shall be wholly forfeited, and ~~if the same shall not~~ be seized, the owner, agent, freighter, or factor of such vessel, shall, for every such offence, ~~forfeited~~ pay a sum equal to double the value of the vessel and cargo, and shall never after be allowed a credit for duties."

If the words used in the third section of the supplement, which are above quoted, be construed literally, so as to give to the United States an option to seize the property, or to let it alone, it will not be easy to distinguish this from the case of the United States *vs.* Grundy; because they would amount to this, that the vessel and cargo shall be forfeited, if the United States shall choose to seize them, or if not, then double the value; which would be precisely to give an election to the government, to take the one or the other; in which case it is decided, that until the election is made, no change of property takes place, either immediately, or by relation to the offence. This construction, however, is rejected by the District Attorney, and is certainly not to be supported, since it would be extraordinary to give to the government an election in all cases, and under every possible circumstance, to take the thing itself, or the double of its value. In the registering Act, the punishment for a false oath, is forfeiture of the vessel, or its value, which gives a fair alternative to the government.

If the words "shall not," be construed "cannot," which we think they ought, the question will be, at what time does the forfeiture of the double value accrue? But, first, it may be necessary to consider in what the offence consists, for which the forfeiture of the property is given? Departing from one port, without a permit or clearance, though with intention to go to some other port in the United States, constitutes one offence. Proceeding to a foreign port, though without a clearance from the port of departure, to some other port in the United States, is a distinct offence, and is the one for which this information is filed. But is it necessary to consummate the offence, that

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the vessel should actually enter the foreign port? We think not, for the following reasons: First, that such a construction would defeat the obvious intention of the law, which was to protect the property of our citizens from capture by the belligerents, as well as to induce a change of conduct in those powers, in respect to our neutral rights, by withholding from them the supplies, which their necessities might require. But this policy would have been defeated, if, notwithstanding the embargo, our vessels might freely navigate the ocean, where the danger of capture existed, and whence the wants of the belligerents might be supplied, by transshipping cargoes from one vessel to another. Another reason against such a construction of the law, is, that if the offence be not complete until the vessel shall enter the foreign port, the remedy for enforcing the forfeiture by seizure of the property, would at the same moment become ineffectual; because within a foreign jurisdiction, no seizure could be made, and a case like the present would seldom occur, of the property being brought back to the United States. It seems proper, therefore, to consider the forfeiture as having accrued, whenever the vessel calls for a foreign port, although she has not entered it.

The inquiry may now be properly made, at what time does the forfeiture of the double value accrue? The answer obviously is, whenever the forfeiture of the property cannot be effectual by seizure. But it cannot be contended, that so long as a possibility exists of the property returning to the United States, the forfeiture of the double value, and the right to sue for it, remains suspended; and, consequently, some reasonable time must be fixed, when the right to sue for the double value attaches. Two forfeitures cannot, under this law, exist at the same time. If the one cannot be made available, in consequence of the escape of the thing itself, then the other is substituted in its stead; whence it would seem necessarily to follow, that when the right to claim the double value attaches, the forfeiture of the property itself, for which the substitute is gi-

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ven, ceases. It is no answer to say that the United States are not obliged to sue for the double value, as soon as their right to claim it attaches, but that they may wait for the chance of the return of the property, when it might be seized; for the question does not depend upon a choice of remedies, but upon the vesting of a right to a particular forfeiture. If the forfeiture of this vessel continued from the time when the offence was committed, until the time when she might be seized, then the right to claim the double value, never could in the mean time attach, unless by supposing either that there did, at some period, exist a forfeiture both of the property and of the double value, or that the forfeiture of the double value depends upon the will of the United States, instead of the circumstance that the property cannot be seized; neither of which positions, we think, can be maintained. If the forfeiture of the double value has accrued, at any time between the commission of the offence and the return of the property, and it be admitted that two forfeitures cannot, under the fair construction of this law, exist at the same time, then the right to the double value must extinguish the right to the property, which cannot, upon any legal principle, be revived by the return of the property to the United States, particularly after it has passed into the hands of a bona fide purchaser.

Without determining at what precise time the right to sue for the double value attaches, it is sufficient, in this case, to say that no possible objection could be stated to the action, after the vessel had got within a foreign jurisdiction.

This opinion renders any decision upon the claims of the material men unnecessary.

The sentence of the District Court must be reversed.

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progress to Portland, was favorable for Charleston; and the master determined to steer for that port. On the 10th, the vessel came off Charleston, but the wind was such as to prevent her from approaching it; and the disability of the crew still continuing, the master was compelled to steer her before the wind, and to proceed to the southward. He then determined to proceed to Porto Rico to repair, the vessel having suffered considerably by the weather, and being in a leaky condition. She arrived at Porto Rico on the 17th; and on the 28th, she was ordered by the governor to unload, and was, by the same order, prohibited from taking away her cargo from the island, but was permitted to dispose of it there. The captain accordingly sold his cargo, repaired his vessel, and returned to the United States on the 9th of March. It appeared in evidence, that the vessel, when at Porto Rico, could not have returned to the United States without repairing.

The reality of the necessity, which compelled the defendant to put into Porto Rico, or from returning with his cargo to the United States, was questioned by the District Attorney. But if the evidence was believed, he contended, that the prohibition of the governor to bring away the cargo, was not a peril of the sea—what are dangers of the sea, he cited Abbot, 202. 206. 203, 204. 207, 208, 209. 211. 1 T. Rep. 31. 1 Bac. Ab. 444. Mark, 61. Peake, 212. 262. 2 Marsh. 418. Peak, 63. Babb. 37.

If the defendant relied upon the Act of the 12th of March 1808, which speaks of unavoidable accidents, it was contended that there must be a loss by unavoidable accident, which did not happen in this case; and, at all events, the enforcing law declares, that this evidence shall not be given, except upon terms which have not been complied with.

Mophison, Jagersell, Levy, and Peters, for the defendants, contended, that what constituted a peril of the sea, was matter for the jury, under direction of the Court. Abbot, 184. That the order to land, and the prohibition to carry away the

PENNSYLVANIA, J.

The United States vs. Hill.

cases, were a consequence of the vessel being forced into Porto Rico in distress, and were a peril of the sea. That the vessel was incapable of returning from Porto Rico, without repairs, which the defendant was not bound to make, in order to save his bond. But, at all events, the Act of the 12th of March was conclusive; and if the enforcing Act was to be construed so as to deprive the defendant of the advantage granted by this law, it was *ex post facto*, and void. But, in truth, the enforcing Act, by declaring that if the certificate of relanding shall not be returned in two months from the date of the bond, suit shall be brought, shows that the law can only apply in cases where the bond has been given within two months of the passage of the law. As to the construction of laws, and their invalidity if unjust or impossible, Bonham's case, Plow. 206, was cited.

WASHINGTON, Justice, charged the jury. After stating the evidence—The first question is, whether the defendant was prevented, by a peril of the sea, from relanding his cargo at some port in the United States? What constitutes a peril of the sea, is a question of law. Whether the defendant was prevented by such peril from complying with the condition of his bond, is a fact for you to determine. It is true, the question will sometimes become, in process of time, a point of law, which, depending originally on extraneous evidence, has been submitted to the determination of the jury, as a question of fact. In mercantile transactions, particularly, it has often become necessary, in order to arrive at the real intention of the parties, to inquire into the meaning of certain phrases, used in commercial instruments, perfectly well understood by those who use them, but which are otherwise ambiguous, and sometimes unintelligible. When the meaning of those terms is once ascertained, public convenience requires that they should receive a legal definition, and be considered as immutable. In this confusion and uncertainty would prevail in legal proceedings if the construction of commercial, any more than of other

The United States vs. Hall.

statements, should be confided to the jury, who might in one case decide one way, and vary it in some other, so as in truth to afford in notice a rule by which men should govern themselves.

What, then, is the meaning of the expression, "perils of the sea"? Without attempting a definition which should include every possible case, it may safely be laid down, that the accident, which is attributable to this cause, must happen without any fault or negligence in the master, and must occur at sea; or if on land, it must be the immediate and necessary consequence of a peril happening at sea; such as tempests, lightning, loss by pirates, injuries sustained by being run foul of by another vessel, and the like. If a peril of the sea has occurred, but is not the immediate cause of the loss, it cannot be fairly brought within the exception; and in this light I view the order of the government of Porto Rico in relation to this cargo. Adverse winds and severe weather, perils unquestionably of the sea, were the immediate cause of this vessel putting into Porto Rico, in a disabled state; and the order of the government to sell the cargo, was the immediate cause of the defendant's disability to comply with the condition of his bond. A peril of the sea was the remote cause, by placing her in a situation to sustain this injury by the operation of a new cause, but was not itself the cause. The order of the government, therefore, is not to be considered as within the exception. But nevertheless, the defendant was, independent of this order, prevented by a peril of the sea from relanding his cargo in the United States, if the evidence be believed by the jury; because, by that evidence, it appears, that by storm and cold weather, the vessel was not only forced into Porto Rico, but arrived there in so disabled a state, that she could not, without danger to the lives of the crew, have returned to the United States. What then was to be done? The answer is plain—The master was bound to repair if he could, because the perils of the sea had interrupted the voyage. He was bound to do all in his power to return with his cargo to the United States, in order to save his bond.

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• The United States vs. Hall.

was disabled from returning to the United States without being repaired;—as there may be cause for trial, where no such disability had resulted from the perils of the sea,—and a gentleman concerned in those cases has been heard upon these other points; it would be improper in the Court not to notice them.

The defendant argues, that although the jury should not think his case to be within the exception of perils of the sea, he is nevertheless permitted, by the Act of the 12th of March 1808, to excuse himself, by proving that he was prevented, by unavoidable accident, from relanding his cargo in the United States; and that the conduct of the government of Porto Rico comes within this description. On the other side, it is contended, that it is not enough, under this law, to prove unavoidable accident, unless it was accompanied by a loss of the property; which did not happen in this case, the defendant having received the full value of his cargo.

The truth is, that the words of the law will bear either construction. It may be read thus: "Judgment shall be rendered, unless proof be made of relanding, or of loss by sea, or of other unavoidable accident." Or thus: "unless proof be made, of relanding, or of loss by sea, or by (viz. loss by) other unavoidable accident." In such a case, it is the business of the Court to prefer that interpretation which is most reasonable, and consistent with the intent of the legislature, so far as it can be collected from the whole system. The object of the law, was to prevent the cargoes of vessels destined from one port in the United States to another, from going to foreign ports; and to punish those who should violate this policy. But it was not intended just to involve in the same fate, those who could, and those who could not, comply with the law. Perils of the sea were therefore admitted as an excuse, by the first law. But this did not comprehend other perils, equally insurmountable, and consequently, equally excusable. This law, therefore, enlarges the ground of excuse, and gives to the obligor an additional defence. But why should he be excused, in case of a

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Cort et al. vs. The Delaware Insurance Company.

sumption of her having been unseaworthy at the time of her departure, as to call upon the insured to give strong evidence to repel the presumption—much stronger than has been offered in this case. But no such presumption is raised against this vessel.

The next objection to the plaintiffs' recovery, is, the want of evidence to justify the sale at Havana. This is certainly a well-founded defence. All that we know about the matter is, that the vessel sustained such injuries, on her return voyage, as to render it necessary for her to put into Havana, to repair. What ought the master to have done, after his arrival at that port? He ought to have had her repaired, if he could; or, if she were unfit to be repaired, or the expenses would have been so great as to have rendered the measure improper, he should have had a regular survey and condemnation, if in his power. But instead of this, he sells the vessel, breaks up the voyage, and thus attempts to convert a partial into a total loss, without showing that it was not in his power to repair, or that the vessel was not worth repairing, and without showing what the repairs would have cost. The sum for which the vessel sold, is no proof at all of the extent of the injury she had sustained. Though valued in the policy at 1500 dollars, she might not have been worth 500 dollars, or she might have been sold at an unfavourable market, or under unfavourable circumstances. If the insured would justify the conduct of their agent in breaking up the voyage, they should have satisfied the jury, by legal evidence, that the measure was proper, and not leave them to unsatisfactory conjectures as to this important fact.

On this point, the verdict ought to be only for such partial loss as the plaintiffs have proved.

Verdict for 500 dollars.

Muller vs. Bohlens.

MULLER vs. BOHLENS.

The defendants sold goods consigned to them by the plaintiff, under a *del credere* commission, and received in payment, for part of the sales, the bill of exchange of W. They were authorized by the plaintiff to remit in bills, and with the other proceeds of sales, they purchased a bill drawn by L. Both bills were protested.

The Court held the defendants liable for W.'s bill, it having been received in payment for a debt guarantied by them, but not for the bill drawn by L., which was remitted according to order.

THE defendants received consignments from the plaintiff, and engaged to sell them on a *del credere* commission, and to guaranty the debts. He sold, to one Walters, part of the goods, and when the money for which the goods were sold became due, he took his bill of exchange for the amount, which he remitted to the agent of the plaintiff. The defendants also purchased another bill of a Mr. Imbert, which they remitted to the plaintiff, in part of the sales of his goods. Both bills were protested, and Walter and Imbert very soon after became insolvent, but the latter remained in good credit until he stopped.

The defendants relied upon a receipt in full, and a discharge, given by one Muller, the attorney of the plaintiff, to the defendants, in which these two bills were charged to the plaintiff. But, having only a notarial copy of the letter of attorney, the Court refused to let the copy be read. The law of this state authorizes the recording letters of attorney, upon their being acknowledged or proved before a notary; but this was neither.

WASHINGTON, Justice, charged the jury, The guarantee of the defendants extended no farther than to the sales and receipts of the money arising from them. As to Imbert's bill,

Muller vs. Bohlens.

therefore, there is no pretence for charging the defendants with that, as it was a bill purchased by the defendants from a man in good credit, and was purchased for the purpose of a remittance, as the defendants had been directed. But the guarantee extends to Walter's bill, which was not purchased with the proceeds of the plaintiff's goods, but was given by a purchaser of those goods instead of the money. If the defendants were bound to guarantee the payment of this debt when contracted, the guarantee continues, because a bill which is dishonoured, is no payment. The only objection to the plaintiff's recovery of the amount of this bill, is his neglect in not returning the bill, or giving notice of the protest, or rather, the defect of the plaintiff's evidence in accounting for this bill. It does not appear whether Walter's estate made any dividends; if it did, the defendants would have been entitled to come in, if the bill had been returned. This point is left to you, on the evidence.

Verdict for the plaintiff, for the amount of Walter's bill, and interest.

 Lessee of Morrell vs. Craefe.

LESSEE OF MORRELL vs. CRAEFE.

The Act of Assembly of Pennsylvania, passed the 26th of March 1785, which declares that no sheriff's deed, made *bona fide*, and for a valuable consideration, where quiet and peaceable possession has been had for six years, shall be adjudged defective for not producing any writ of *feri facias*, &c., is a full answer to any objections founded on the process and its execution, under which the party acquired the title.

THIS was an ejectment for a house and lot in Philadelphia. The lessor of the plaintiff claimed under a sheriff's deed, made in virtue of a judgment, *feri facias*, and *venditioni exponas*, against one Doyle. At the sale, the property was purchased and paid for by Mr. Ball, but intended for the family of Doyle, who remained in possession by permission of Ball, from the time of the purchase in 1770. In 1784, Ball sold so much of the entire lot as repaid his advance, leaving the part for which this ejectment is brought, which he conveyed to one Stewart, (who married Doyle's daughter,) and his wife, remainder to the heirs of the wife.

The title was objected to, the return to the *feri facias*, the inquisition, and the *venditioni exponas*, not being produced; and the purchaser not having obtained actual possession of the property.

By the Court. The Act of Assembly, passed on the 26th of March 1785, which declares that no sheriff's deed, made *bona fide*, and for a valuable consideration, where quiet and peaceable possession hath been had of the same for six years, shall be adjudged defective, for not producing in Court any writ of *feri facias*, &c., or any returns thereon, is a full answer to the objection. The issuing of the necessary writs in this case, is

Lesse of Morrell vs. Crafe.

proved by the docket of the Court, and the possession of Doyle was the possession of Ball, under whom he held.

The defendant offered a deed from Mrs. Stewart to a person under whom he claims, made during her husband's life, whilst he was in Ireland, and which was given in order to raise money for her support. The Court refused to let it be read, unless the death of her husband was proved, because, as the deed of a *feme covert* it was void.

The defendant then read a deed from Stewart, of his life estate, and contended that it was not clearly proved that Stewart was dead. The evidence was that he had not been heard of for many years. His wife married again, and two of the witnesses deposed, that they had heard some years ago that he was dead.

WASHINGTON; Justice, charged the jury. The whole cause turns upon the fact, whether Stewart is dead; because, if alive, the plaintiff, who is only entitled to an estate in fee after his death, cannot recover. But the evidence in the cause, raises so strong a presumption of his death, that unless the contrary had been shown, the jury ought to consider the fact as proved.

Verdict for the plaintiff.

FISHER vs. CONSEQUA.

The plaintiff issued a foreign attachment against the defendant, a merchant of Canton, for the recovery of damages, to the amount of four thousand five hundred dollars, upon a promise made by him, for a valuable consideration, to deliver to the plaintiff a quantity of tea of a certain quality, which promise he had not complied with, but had broken.

The law of Pennsylvania, of 1705, has received a liberal construction in the Courts of the state, so as to extend its remedies to debts contracted in foreign countries, by persons who never resided in the state. The law is remedial, and ought to be so construed as to remove the mischief which is spoken of.

To constitute such a debt as may be pursued by a foreign attachment, under the law of Pennsylvania, the demand must arise under a contract, without which no debt can be created; and the measure of the damages must be such as the plaintiff can aver, by affidavit, to be due, without which special bail cannot *regularly* be demanded.

The remedy by foreign attachment will not lie for demands which arise *ex delicto*, or where special bail cannot regularly be required.

The promise of the defendant to deliver teas of a particular quality, was not complied with, and as the plaintiff swears that the difference between the teas promised and those delivered, amounted to a particular sum, a foreign attachment lies.

It is no ground for dismissing a foreign attachment, instituted in this Court, that the plaintiff had sued out another attachment against the defendant in a state Court, and afterwards discontinued it.

RULE to show cause, why the foreign attachment issued in this case, should not be dissolved. The plaintiff showed cause, by filing an affidavit, in which he stated, that he and the defendant, a Hong merchant at Canton, entered into a contract there, by which the defendant, for a full consideration paid to him, agreed to put on board the Pennsylvania Packet, as the property of the plaintiff, a cargo of teas of the very first quality, for the Amsterdam market; and if the said teas should

Fisher vs. Consequa.

not prove of such quality at the sales in Amsterdam, he, the defendant, bound himself to make good all deficiencies. That the cargo so put on board was landed at Philadelphia, and afterwards reshipped to Amsterdam, without having suffered any kind of damage since the purchase; and the plaintiff alleges that he has been informed, and believes that these teas arrived in safety at Amsterdam, and were there landed and storehoused free from all damage. But, upon examination by a sworn officer, they were found, with a trifling exception, to be of the most common and indifferent kinds, and were sold by the East India Company at Amsterdam, for the highest prices that could be obtained, and that the difference between the best price that could be, and was obtained for the same, and that which an equal quantity of the qualities contracted for, according to the rates of sale, at the same time and in the same place and mode, amounted to four thousand five hundred dollars; in which sum, exclusive of interest, the plaintiff avers that the defendant is justly indebted to him.

This affidavit being objected to, for not stating *positively* what the quality of these teas was, at Amsterdam, and the prices for which they sold, the plaintiff filed a supplementary affidavit, affirming that the defendant, Consequa, is indebted to him in the sum of four thousand five hundred dollars, besides interest, upon a promise, made by the defendant, for a valuable consideration, to deliver to the plaintiff a large quantity of teas of a certain quality; which promise he hath not complied with, but hath broken.

Mr. Ingersoll, Mr. Dallas, and Charles Ingersoll, for the defendant, contended that the plaintiff's demand was for unliquidated damages, and that neither by the custom of London, nor under the Act of Assembly, passed in 1705, could a foreign attachment lie, except in cases of debt. Cases cited, 1 Dall. 154. 218. 219. 2 Dall. 123. 237. Privileges of London, 253. 267. Vent. 111. 1 Ld. Ray. 727. Latw. 421. 1 Ld. Ray. 56. Cowp. 56. 3 Wils. 302. 1 Bac. Ab. 689. 1 Dall. 219. 375.

Fisher vs. Consequa.

Rawle, Lewis, and Morgan, contra, cited Binney, 35. Cowp. 529. 2 Wils. 335. 2 Stra. 1192. 2 Burr. 1032. Fortesc. 197. 2 Dall. 330. They contended, that the 3d section of the Act of Assembly speaks of debt or other demands, which enlarges the interpretation of the statute. They admitted, that, according to the custom of London, the garnishee must owe a debt to the defendant; but it is not necessary that the groundwork of the attachment should be a debt.

WASHINGTON, Justice, delivered the opinion of the Court. In deciding the question, whether a foreign attachment will lie in such a case as the present, we shall come at once to the Act of Assembly, passed in 1705, which first authorized this mode of proceeding, and inquire what is its true meaning, in relation to the point now under consideration? We do not, by this, mean to say, that in no instance ought the custom of London, in respect to foreign attachments, to be regarded; it may, and in practice has probably been frequently referred to with advantage. But we should not feel ourselves authorized to extend or to limit this remedy, by rules established under the custom, where such rules are broader or narrower than the law of this state.

It must be admitted, that, according to a strict and literal construction of the Act of Assembly, the foreign attachment is confined to cases of debt; and not only so, but to debts contracted or owing within this state, by persons absenting themselves therefrom. The 3d section, which was much relied upon by the plaintiff's counsel, as extending the remedy to other demands than debt, is in this respect clearly confined to residents about to abscond, or to leave the state, and who refuse to give security to the complainant for his debt or other demand. The nature of the case presupposes an inability in a non-resident to give such security. Nevertheless, we find that this law has received in practice a liberal construction, so as to embrace debts contracted in foreign countries, by persons who never did

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reside here, and who, of course, could not properly be said to *absent* themselves; and which debts, neither by the terms of the contract, nor by the removal of the debtor hither, could be said to be *owing* here.

This is a remedial law, and *sought*, upon the soundest principles of construction, to be so extended as to remove the mischief, and to advance the remedy. The mischief, as the preamble informs us, was, that the effects of absent persons were not equally liable with those of persons dwelling on the spot, to make restitution for debts contracted, to the injury of the inhabitants of Pennsylvania. The remedy provided for this evil, was a process by which the property of absentees or absconding persons, found within the province, was rendered liable to make satisfaction. But the same preamble speaks of *debts contracted or owing*, and it is contended, that the remedy can be extended only to cases of debt. What is a debt? In strict law language, it is a precise sum due by express agreement, and does not depend upon any after calculation to ascertain it. The remedy for recovery of it is by action of debt, and frequently by action of *indebitatus assumpsit*. But is this the only case within the mischief intended to be remedied by this law? Surely, an inhabitant of Pennsylvania is not less injured by the want of a remedy to recover what is due to him by a foreigner, upon a sale of property, where no price was stipulated, than he would be if a fixed price had been agreed on. In the latter case, the defendant is indebted to the plaintiff in a precise sum; and in the former, a sum equal to the value of the property sold, not then, it is true, liquidated, but depending upon the value to be fixed at the trial. The uncertainty of the sum due, does not, in the common understanding of mankind, render it less a debt. A promise, whether express or implied, to pay as much as certain goods or labour are worth, or as much as the same kind of goods may sell for on a certain day, or at a certain market; or to pay the difference between the value of one kind of goods and another, creates, in common parlance, a debt; and the

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person entitled to performance does not speak of his claim, as for damages, but for a debt, to the amount which he considers himself entitled to.

But it is not every claim, that, upon a fair construction of this law, or even in common parlance, can be denominated a debt. For, in the first place, the demand must arise out of a contract, without which no debt can be created; and the measure of the damages must be such as the plaintiff can aver by affidavit to be due; without which, special bail (which the defendant, by giving, may dissolve the attachment) cannot regularly be demanded. It follows, from this, that a foreign attachment will not lie for demands which arise *ex delicto*, or where special bill could not be regularly required. Although we meet with no adjudged case, in this state, precisely upon the point of this cause, yet enough may be gathered from what has fallen from the Judges, to show how this attachment law has been considered in practice:

In *M'Clanaghan vs. M'Carty*, the Judge says, that "after judgment against the defendant in the attachment, the plaintiff files his declaration according to the nature of the demand. If in debt, no oath is required; if in case, then a writ of inquiry issues, to ascertain the demand." Now, if *indebitatus assumpsit* were the only declaration upon which the writ of inquiry could issue, it is hardly to be believed that the judge would have used so comprehensive an expression, as that of a *declaration in case*. It is most obvious, that his mind took a more enlarged view of the remedy, and considered it as embracing other cases than those of *debt*, strictly so called. So, too, when the Court say, in other cases which have been decided, that it is the practice to inquire into the cause of action in a foreign attachment, as in that of bail on a *capias*, and to dissolve in the one instance where they would not hold to bail; we consider the practice in relation to bail, as so far connected with that of the foreign attachment, that if *regularly* bail would be required, in matters of contract, the attachment would not be dissolved.

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This is a case of contract, by which the defendant binds himself to deliver to the plaintiff teas of a certain quality, and suited to a particular market; and on failure to do so, to pay the difference between teas of such quality, and such as should be delivered. Teas, agreeably to contract, were not delivered; and the plaintiff swears, that the difference amounts to 4500 dollars. Whatever be the difference, the defendant has promised to pay it, and of course is to that amount indebted to the plaintiff; and if he were present, and served with a *capias*, he would be held to bail, as of course. There is, therefore, upon the principles before stated, no ground to dissolve the attachment.

As to the other ground taken by the defendant, that an attachment against his property, by the same plaintiff, and for the same cause of action, was sued out in the Common Pleas of this state, and afterwards discontinued, there is no evidence of an intention to harass the defendant, so as to induce this Court to dissolve this attachment; which (unlike the case of holding to bail, where the second action still proceeds,) would be tantamount to a denial of any remedy at all, to recover what he thinks himself entitled to. I am not prepared to say, that the rule observed in relation to discharging on common bail, on the ground of vexation, is at all applicable to the case of dissolving an attachment. On this point, however, I give no opinion.

Rule discharged.

Corps vs. Robinson et al.

CORPS vs. ROBINSON ET AL.

In an action for the recovery of a debt, said to be due by the defendant, as the dormant partner of B. and A., a person who is a creditor of the partnership, is not a competent witness to prove the defendant a dormant partner in the firm indebted to him.

There is no objection to the examination of the head clerk of one of the parties, for he has no privileges like those of an attorney.

Where accounts have, on notice from the plaintiff to the defendant to produce them, been delivered to the plaintiff, and retained by him, and without objection, the defendant may insist on their being read on the trial of the cause.

The acknowledgment of a debt by one partner, will bind another partner, after the partnership is proved; but it is not sufficient or proper to be given in evidence to prove a partnership.

THIS suit was brought to recover from the defendants, Robinson & McClure, the amount of one out of three notes, due from Barker & Annesley, for ninety-six hogsheads of tobacco, sold to them by the plaintiffs, upon the ground that the defendants were dormant partners with Barker & Annesley in that purchase, and were to share in profit and loss. The two first notes were paid by Barker & Annesley, before their failure.

Mr. Cope, the voluntary assignee of Barker & Annesley, was sworn in chief; and after having given some part of his evidence, he stated that he was a creditor of Barker & Annesley, and considered himself interested in fixing this debt upon the defendants.

He was then objected to by the defendants, on this ground.

Peters, Judge, considered the witness as incompetent, upon the ground of interest; because, although, as it was said by the plaintiff's counsel, if the plaintiff recover against the defendants, the defendants will become creditors of Barker & Annes-

Corps vs. Robinson et al.

ley, instead of the plaintiff, still, they will not be creditors for so large an amount; and, consequently, will not diminish the fund out of which the witness can expect to be paid, as much as if the plaintiff should recover. For the plaintiff, if he should be obliged to seek payment from the estate of Barker & Annesley, would receive his dividend on his entire claim, whereas, should the recovery be had of the defendants, on the ground of a partnership, the defendants could only receive a dividend on one-half, they being, as partners, bound to pay the residue themselves.

Washington, Justice, was of the same opinion, as to the incompetency of the witness, and concurred in the reason assigned by *Judge Peters*. He stated another reason, which was, that it did not, and could not now appear, that the defendants would, in case of a recovery against them, be entitled to diminish the fund, out of which the witness expected to be paid, a single dollar; because the defendant could not come in, as a creditor, upon the separate estate of Barker & Annesley, except for any balance, which, upon a settlement of accounts, might be due to them; as to which, the Court cannot now say that any such balance would be due. So far as the evidence has gone, it appears that Barker & Annesley paid two of the notes given for this tobacco, and as to this transaction, the defendants, if partners, would be debtors to Barker & Annesley.

The plaintiff called upon the head clerk of the defendants to communicate what he knew of the partnership, which was objected to by the defendant's counsel, on the ground, that he, no more than an attorney, ought to be compelled to disclose the secrets of his principal.

By the Court. It is certainly a very unpleasant thing, to compel a person, standing in the situation of this witness, to betray the confidence of his principal. But it has never been considered as an objection which the witness can make, and were it to be laid down as a general rule, that a person, stand-

ing in such a situation, could excuse himself from giving evidence, it is impossible to foresee the extent of the mischief which might arise from it. The objection cannot prevail.

The counsel for the plaintiff waived the examination of the witness.

The plaintiff gave notice to the defendants to produce the accounts rendered to them by Barker & Annesley, in certain years, in relation to their joint purchases in tobacco. The accounts were now produced, but the defendants objected to their being read, upon the ground that they could not be evidence against them, to prove a partnership with Barker & Annesley, the point in issue between the parties.

By the Court. These accounts having been rendered by Barker & Annesley to the defendants, and retained by them without objection, that appears, are proper to be offered in evidence; as much, and rather more so, than if Barker & Annesley had, in the presence of the defendants, declared the partnership.

The plaintiff then offered to give evidence of the acknowledgment of Annesley, that a partnership did exist between Barker & Annesley and the defendants, in the purchase of this tobacco.

By the Court. The acknowledgment of a debt by one partner, will bind the other, because each is bound for the whole. But where the question is, whether a partnership exists or not, the acknowledgment of one of the defendants, or of a third person, is no evidence against the other. Overruled.

Judge Peters charged the jury; and after summing up the evidence, left to them the question, whether the partnership in this purchase, was proved.

Verdict for the defendants.

Bauduy et al. vs. The Union Insurance Company.

BAUDUY ET AL. vs. THE UNION INSURANCE COMPANY.

An insurance was made by R., a citizen of the United States, and a resident merchant of Philadelphia, on specie, from Cape François to Philadelphia, with a warranty of neutrality. Upon the happening of a loss, R. received from the defendants nineteen hundred and ninety-seven dollars, the amount of the specie shipped; but finding that of this sum, only eleven hundred and fifty-two dollars were his property, he returned the balance to the defendants, against whom afterwards the plaintiffs, resident merchants at Cape François, brought this suit for the money so returned by R.

The plaintiffs being persons established and carrying on trade in a belligerent country, cannot recover against the defendants, even if the insurance had been made for their account, as there was no disclosure of their belligerent character, at the time of the insurance, which was so obviously material, as to avoid the policy.

MR. RALSTON of Philadelphia, having consigned to the house of Peter Bauduy & Co., established at Cape François, two cargoes, on account of which he had received some remittances, but without account of sales, received a letter from a Mr. Hogan of the Cape, informing him that he had shipped, on his account, three thousand dollars in specie, in a certain vessel, for his government in making insurance. Ralston, not knowing on what account this shipment was made, and suspecting that the intention was to cover property in his name, determined not to insure it. But soon after, meeting with Peter Bauduy, one of the partners, residing in the state of Delaware, the said Bauduy informed him that Hogan was an agent for the house of Peter Bauduy & Co.; and he presumed that the three thousand dollars were the proceeds of the cargoes, which he, Ralston, had consigned to that house. Upon this, Ralston insured this money with the defendants, in his own name, and in

Bauduy et al. vs. The Union Insurance Company.

the name of all persons concerned, (as usual,) with a warranty that the property was neutral. Only nineteen hundred and ninety-seven dollars were put on board, and the vessel was captured, and the cargo condemned at Jamaica. On notice of the loss, Ralston applied to the defendants for payment, and received from them the sum shipped, and the policy was cancelled. Some time afterwards, Ralston was put into possession of the books of Peter Bauduy & Co., and then found, from the account of sales of his cargoes, that only eleven hundred and fifty-two dollars of this money belonged to him; upon which he repaid to the defendants, the balance of what he had received from them. This suit was brought to recover the sum so repaid, upon the ground that it was the property of the plaintiffs, and was covered by the policy. It was admitted, that the plaintiffs were all American citizens.

WASHINGTON, *Justice*, charged the jury. There are three questions in this cause, neither of which is involved in any difficulty. First; did the plaintiffs authorize Mr. Ralston to insure their part of the money shipped? secondly; did he insure it? and, thirdly; if he had insured it, can the plaintiffs recover in this action. The two first depend upon the facts proved in the cause, and nothing can be more clear, than that Mr. Ralston was not requested to insure any part of this money, as the property of the plaintiffs; and that he did insure it, believing it to be his own. He has stated, that whilst he supposed his name was intended to be used to cover the property of others, he declined insuring at all, and was only induced to do so, from the representation of one of the partners, that the money was his own. But if he had insured it as the property of the plaintiffs, still they could not recover in this action, inasmuch as the nondisclosure to the defendants, that it belonged to persons established and carrying on trade in a belligerent country, was so obviously material to the risk, as to avoid the policy.

Verdict for the defendants.

OCTOBER TERM 1809.

Greenleaf vs. Maher et al.

GREENLEAF VS. MAHER, SMITH, & PENDLETON.

A perpetual injunction was granted, in order to stay proceedings on a judgment at law, obtained in a suit instituted in the name of a person not interested, whose name was used only for the purpose of preventing a defence, which the defendant had against the real plaintiff in interest.

THIS cause now came on to be heard, upon the bill, answers of all the defendants, replication, and the deposition of a Mr. Jackson, an agent of Maher; who deposed, that in 1808, he, (having been authorized by Maher to take land,) received a conveyance from one Justice Smith, in part payment of Smith's acquittance of the bill held by Maher, at the price of about twenty-four hundred dollars, at which it was valued by three disinterested persons, for which sum he had passed his receipt to Mr. Smith. The judgment at law, by Smith against Greenleaf, was rendered in November 1806, afterwards this injunction was granted, subject to the decision of the Court in this cause, whether the said Smith was entitled to recover in that action.

Tilghman and Ingersoll for the complainant, contended, that until actual payment, or real satisfaction made by Smith to Maher, no action could be maintained by Smith against Greenleaf. Even if Smith had given his bond to Maher, and he had accepted it as payment, it would not have been sufficient. 3 East, 160. 2 T. Rep. 371, 379. 3 Black. Com. 163, note 5. As to the note given by Greenleaf to Smith, in New Jersey, it was given under such circumstances of oppression, that it cannot be supported. Greenleaf was, at that time, sued by Maher in this Court. The suit in New Jersey was for the amount of Maher's bill, and the one assigned to ———, although it is not pretended that any part of this last bill had been satis-

fed or secured, and bail was marked for thirty-five thousand dollars.

The payment in 1898, was objected to as unsatisfactory, in respect to the *bona fide* nature of it.

Dallas and Rawle, for the defendants, argued that it was of no consequence to the complainant how Maher was satisfied. A note given and received as payment by a surety, is sufficient to entitle him to recover. If his body be taken in execution, it is a payment. There is no distinction between this case and one where a bond of indemnity is given. In this case, the complainant promised to provide funds to enable Smith to pay, and a principal may be bound to indemnify, without giving a bond. The surety may sue in Equity, to compel his principal to indemnify; also to compel the creditor to bring his suit against the principal. Cases cited; 1 Vent. 261. 5 Co. 24. 6 Mod. 87. 2 Esp. Rep. 571. 1 Vern. 229. 18 Vin. 244. Anstr. 544. 3 Wils. 13. 266. 346. 1 T. Rep. 649. 715. 4 Barn. 229. 2 Com. Dig. 327.

WASHINGTON, Justice, delivered the opinion of the Court. If we had any doubt in this case, we should take time to consider it; but we have none. We cannot but perceive that the suit at law was brought by Maher, in the name of Smith. The deeds of trust, the acknowledgment of the defendants in their answers, the arrangement in New-Jersey upon the arrest of the complainant, and every circumstance in the cause, prove this beyond all controversy. The case, then, is no more than this: Maher, the payee of this bill, whose claims against the complainant, as drawer, was forever barred by the certificate of the complainant, by an arrangement with Smith, acknowledging himself satisfied in respect to him, receives an assignment from Smith to certain trustees of his, Smith's claim upon the complainant, and now uses Smith's name to recover the money. But had Smith any cause of action against the complainant, which he could assign? Merely as acceptor or surety, he

had none. But if he had paid Maher, after the certificate of bankruptcy of Greenleaf, a cause of action would then, and not before, have accrued, and this, being subsequent to the certificate, could not have been barred by it. This seems to be so obvious, that it can only be necessary to notice the objections to it.

It is said that Smith has given a satisfactory security to Maher, which is equivalent to a payment. What is this security? As to his claims upon Postreney & Hornby, and upon the French government, it does not appear, nor is it pretended, that they have produced, or are likely to produce, one shilling; and if they never should, Smith can be in no worse condition than if he had not given the deed. If the first deed was equivalent to satisfaction and payment, then this took place before the certificate, which would be fatal to the claim. The other security is this very debt, in which, as before observed, Smith had no interest, until he had first paid Maher. If Maher had gratuitously advanced Smith, would the latter have recovered against Greenleaf, on the money paid to his use? Certainly not.

It is said, that Greenleaf is bound to indemnify Smith. This is not the fact; but if it were, the action of Smith must have been for a breach of that contract, and not for money paid for his use, which was never paid.

It is said, that Greenleaf, being complainant in Equity, must do equity; and this equity consists in paying or indemnifying Smith. But this is begging the whole cause. It is the very thing which Greenleaf says, and very justly too, he is not bound to do; and it is to be relieved against such a claim, that he comes into this Court.

As to the payment, said by Jackson, the witness, to have been made in 1808, it was after this cause was for hearing; and it comes in too questionable a shape to be accredited now. It is obvious, that the whole object is to vest in Maher a right to recover against Greenleaf, where alone he has a chance to get any thing. He would therefore care very little about giving

Greenleaf vs. Maher et al.

a receipt for ten times the amount of the property transferred; and it is to be observed, that this alleged payment is about nine months before the answer of Maher is sworn to, and yet he does not notice it. Besides, although we have the testimony of the witness, we have not that of the defendants, in order to ascertain the reality of this payment.

If, however, this payment has been *bona fide* made, and is a real transaction, and still further, if the trust property should turn out productive, or Smith should be enabled to pay Maher, it would be inequitable to bar the right of Smith to proceed at law upon his judgment, by an absolute decree; and therefore we shall decree a perpetual injunction as to the judgment at law, and as to a transfer of the note given in New-Jersey, under circumstances which require us to prevent it from operating against the persons who gave it. But this decree will be without prejudice to the defendant Smith, in case he should hereafter make payment or other equitable satisfaction to Maher; or in case he should be able to establish the payment made in 1808, to the satisfaction of the Court; and here will be reserved to him, at any future time, to open this decree for these purposes. We shall not decree the New-Jersey note to be delivered to the plaintiffs, or to be cancelled, but to be delivered to the clerk of this Court; and reserve for future consideration, in case this decree should be opened, whether Smith should be entitled to the benefit of that security. The costs of this, and the suit at law, to be paid by Smith and Maher.

OCTOBER TERM, 1809.

Slocum & Wife vs. Marshall et al.

SLOCUM & WIFE vs. MARSHALL ET AL.

Where a conveyance had been made of her real estate by a daughter to her father, immediately before her marriage, under a belief that she would be benefited by the same, and that she, ~~proving~~ conveyed by the deed would become heir after the decease of her parent; and where the operation of the conveyance was to give the daughter of the estate; the Court decreed a conveyance of the property, and an account of the proceeds of the part which had been sold, so as to effect the justice of the case, and to give to the daughter the property to which she would have been entitled, had not the conveyance been made.

THE bill states, that the female plaintiff was the only child of Christopher Marshall by his first wife Elizabeth, who died ~~shortly~~ shortly after the birth of this daughter, entitled to a considerable real estate; of which, a tract of land in Bucks County, about twelve or thirteen acres of meadow land near Philadelphia; and a house and lot in Southwark, ~~then~~ parts. In 1781, a day or two before her death, Mrs. Marshall, by deed, conveyed the above-mentioned tract of land in Bucks county, and the meadow tract, in trust for her husband in fee, and the residue of her estate in trust for her daughter; but this deed was not accompanied by the private examination of Mrs. Marshall, and of course was invalid. Mr. Marshall, however, not aware of this defect, made his will in 1799, and devised to the female plaintiff both of the tracts of land to which he supposed himself entitled under the above deed. The bill then states, that the female plaintiff was, in ~~the~~ 1806, prevailed upon by her father to convey to ~~the~~ Collins these two tracts of land, to the use of her father, in fee, but with a parcel declaration of trust by the father, that it was intended for the benefit of his daughter, the plaintiff. That this conveyance was made after the ~~decease~~ death of the plaintiff, Slocum, to the female plaintiff, had

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Storum & Wife vs. Marshall et al.

been made, and favourably received in the family of Mr. Marshall, but that this conveyance, as well as another made by the female plaintiff to her said father, of the house and lot in Southwark, the day before her marriage, was unknown to the plaintiff, Storum, until after his marriage. The prayer of the bill is for an account of the proceeds of the Bucks county land, which the father, Mr. Marshall, had sold for about 8000 dollars, and for a conveyance of the meadow land, and the Southwark property.

The answers of the executors of Christopher Marshall, and of his children by the second marriage, admit the conveyances as stated in the bill, but deny the trust, except in relation to the Southwark lot, which they say they are willing to convey. They admit, however, that Christopher Marshall died intestate, as to the Bucks county and meadow land; and other property, to the value of about 5000 dollars; all acquired subsequently to the making of his will, to one-fourth of which the plaintiffs are entitled.

Some witnesses were examined in Court, on the hearings; and upon their testimony, the nature of which will be noticed in the opinion, the cause rested.

WASHINGTON, Justice, (Peters absent,) delivered the opinion of the Court. The first question in this cause, is, whether the complainants are entitled to be relieved against the deed executed by the female complainant on the 22th of June 1804, either upon the ground of a parol declaration of trust, inconsistent with the absolute nature of the conveyance; or upon the ground of fraud, in reference to the circumstances under which it was given, or they suspected the grantor, or the subsequent rights of her husband? It is sufficient to say, in answer to the first question, that there is no evidence of a declaration of trust, either written or parol, by which the nature of that trust can at all be understood; and the attempt to create and to enforce a specific trust, from the loose and equivocal

Alcock & Wife vs. Marshall et al.

expressions of the parties, made at different times and upon different occasions, would be inconsistent, not only with the spirit and policy of the statute of frauds, but with the general rules of evidence. In this case, it is true, the statute of frauds is not pleaded, or relied upon; but it is still necessary that the parol declarations of a trust should be plain and unambiguous, before the Court can change the absolute nature of the conveyance, and decree an execution of a trust not expressed in the deed.

It is impossible for this Court to say, whether any agreement upon this subject took place between the father and daughter, or if any, what it was. From Mr. Collins's testimony, it would seem, that the intention of Mr. Marshall was to dispose of the Bucks county land; and after bestowing a part of the purchase money upon his daughter, who was about to be married, to invest the residue in some productive fund. As to the meadow tract, that his design was to give her that by his will. His testimony by his testimony throws no light, in relation to an intended gift to the daughter; but would lead us to suppose, that instead of money, it was the intention of Mr. Marshall to bestow upon his daughter a house, in case she and her husband should determine to live in Philadelphia. The testimony of Weir & Beasley affords very little satisfaction upon this subject, as it is quite uncertain whether the re-conveyance which Mr. Marshall declared he meant to make to his daughter, referred to the property conveyed by her to him in June 1805, or to the Southwark lot. From the whole of this evidence, then, it does not appear, whether Mr. Marshall had bound himself, or not, by any promises to his daughter, to convey, or to devise the property to her, or to dispose of it in any other manner for her use; or, whether his different conversations with the witnesses extended any further than to express his own intentions in relation to the property. If, then, the Court were called upon to enforce the execution of any specific agreement between the

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Shocurn & Wife vs. Marshall et al.

That inducements were held out to her, for the partition of her fortune. But this is certain that she had been impressed, generally, that her interest was to be consulted; and that that impression. Yet nothing could be more consistent with her interest, than the deed which she was upon to execute.

That a fraud or imposition of any kind, was at any time meditated against this lady by her father, the fairness and purity of his character forbid me for a moment to suspect. Independent of his general character, the cause furnishes abundant evidence to repel any insinuation to his disadvantage, in this respect. And from this evidence, it is not difficult to conjecture in what manner the conveyance was intended to promote the interest of the two parties to it, and at the same time to gratify the laudable wish of the daughter to fulfil her mother's intentions. It is to be remarked, that more than two-thirds in value of this property was entirely unproductive, and of course could add nothing to the revenue of the father, whose interest was only that of a tenant for life. By converting it into money, and investing that in other property of a more active nature, this inconvenience would be remedied. But the father had no power to sell the fee simple interest in the estate, without being enabled by his daughter to do so. The plan suggested to her was adequate to the purpose, and was therefore adopted. In this way, the interest of the father was promoted. On the other hand, he had devised the whole of this property to his daughter, and not knowing, as is highly probable, that the estate would not pass by this devise, but would be considered as a lapsed devise, he at once perceived that his daughter could not be injured by the conveyance. The deed from the mother was intended to give him the absolute control over the property, and that from the daughter gave effect to that intention. The daughter was to be benefited in two respects—by an advance of money as an outfit on her marriage, and by the protection

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which her father would be enabled to afford her, in the event of any misfortunes which might befall her intended husband. That these were the objects contemplated by the father, is strongly supported by the evidence; and it is not improbable that they were communicated to the daughter. But the will of the former having proved ineffectual for securing to the latter the consideration which induced her to make the deed, a Court of Equity can do nothing less than to set aside the deed, as having been made under a mistake, and for a consideration which has failed. But in doing this, I am clearly of opinion, that the intention of Mr. Marshall would be frustrated, by considering any part of the advances made by him to his daughter as a gift, in addition to her own fortune. I wish I could feel satisfied in depriving her also of any part of his other estate, in which it was decidedly his intention she should not participate. Upon this subject, however, my opinion is not yet conclusively formed; and for the purpose of hearing the counsel upon that point, in case it should not be compromised in the mean time, I shall reserve it for future consideration.

I shall decree a conveyance to the complainant, Elizabeth F. Slocum, of the meadow tract and the Southwark lot; and an account of the money received for the tract in Bucks county; and of all advances made by Christopher Marshall for his daughter, since the 26th of June 1805, or towards the improvement of her property before or since that period.

 Ryberg et al. vs. Snell.

RYBERG & Co. vs. SNELL.

If goods be sold and shipped, upon the account and at the risk of the vendee, the bill of lading making the goods deliverable to him, or being assigned to him, transfers the legal title in the goods, to the perfection of which, nothing is wanted but actual possession. Until this be obtained, the vendor retains an equitable right to countermand the delivery of the goods, if the consideration has not been paid, and the consignee has in the mean time failed.

If the factor should dispose of goods, *bona fide*, which have been consigned to him, although the goods had not come into his hands, but the bill of lading has been actually transferred to the vendee, the right of the principal is defeated. But before the authority to sell has been exercised, the owner may countermand the consignment, or sell the goods while *in transitu*.

To constitute a lien by a factor for his balance, possession of the goods by him, and a right in the principal to the property on which the lien is to operate, are necessary.

THIS was a motion to take off the nonsuit ordered at the trial. (a) After argument, by Hallowell and Rawle, for the plaintiffs, and Hopkinson, for the defendant—

WASHINGTON, Justice, delivered the opinion of the Court. The stress of the argument by the plaintiff's counsel, on this motion, is, that a bill of lading conveys to the consignee a legal title to the property; that a factor, being such consignee, and a creditor of the consignor, for the balance of a former account, has equal equity with a person who, *bona fide*, and for valuable consideration, becomes a purchaser of the property from the consignor, even before possession is acquired by the factor, and is therefore entitled to hold it until his debt is satisfied.

(a) *Ante*, p. 294.

Slocum & Wife vs. Marshall et al.

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which her father would be enabled to afford any misfortunes which might befall her. That these were the objects contemplated strongly supported by the evidence, that they were communicated to of the former having proved in the consideration which induced of Equity can do nothing less having been made under a which has failed. But is that the intention of Mr.

sidering any part of the as a gift, in addition satisfied in depriving which it was decided. Upon this subject formed; and, possibly, in case I shall read

I shall
Slocum

has not been exercised, it is competent to vary the destination of the goods, as he pleases of pleases; or to sell them whilst they are in transit. Afterwards, if he think proper to do so. What should ant him? The factor is his servant in respect to these goods; he has no title to them, and his possession is the possession of his principal.

But it is said, that the factor has a lien on the goods, to the amount of the balance due him from the consignor. This would be very true, if the consignor had not parted with his interest in the goods before they came into the possession of the consignee. But, to constitute a lien, two things must concur, possession by the factor, and a right in the principal to the property upon which the lien is to operate. The goods must come into the actual possession of the factor, the property of

and if the factor
a valuable consideration
transfer of the bill of lading
the principal; and the right of the
coming under him, is defeated. But if

OCTOBER TERM, 1809.

Myberg et al. vs. Snell.

Therefore, M, before such possession, the
itself of all right and title to the goods.

The proposition contended for by

to be true where the consignment

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faith of the consign-

ment of this mo-

rial, viz. that Snell, the

er & Co. to receive from the

as cargo, and to state and settle all

ing to the same, with the usual power

; in consequence of which, it is contended,

the debt due by Echart to the plaintiffs, might not

be chargeable to Gardner & Co., still, their attorney

admitted the charge, they are bound.

This argument again is founded upon a mistake, as to the
powers of the defendant, which certainly did not authorize him
to draw upon his constituents for a debt due from Echart & Co.
or by any act of his, to bind them in any manner to pay a debt
for which they were not legally responsible,

KRUMHAAR vs. BURT ET AL.

A. H. devised an estate to C. S. for life, and after the death of C. S. he directed that the estate should be sold, and divided among the grandchildren of the testator, *who should be living at the death of C. S.* B. married one of the grandchildren, and, before the death of C. S., B. became bankrupt. B. and wife, after the decease of C. S., sold the property claimed under the will of A. H., and the plaintiffs claimed under this conveyance.

The decisions of the English Courts abundantly prove, that a possibility, whether belonging to the husband or the wife, would not pass to the assignees of the husband, on his becoming bankrupt, if it were not for the strong language of the statutes of bankruptcy.

The possibility held by B., under the will of A. H., formed no part of his estate to which he was entitled in law or equity, of which the commissioners could take possession under the fifth section of the bankrupt law of the United States; and, therefore, they could not transfer it to the assignees of the bankrupt, under the provisions of the sixth section.

The provisions of the English bankrupt laws, and those of the bankrupt law of the United States, differ in relation to the contingent interests of the bankrupt; and it is clear, that by the most liberal construction of the law, the interest of the husband in the estate of his wife, under the will of A. H., did not pass to the assignees.

The provisions of the thirteenth section of the bankrupt law, do not affect this question; they do not require an assignment of contingent interests, but relate to their disclosure by the bankrupt.

THE following case was stated for the opinion of the Court. In September 1785, Adam Holt made his last will and testament, whereby he devised as follows:—"I give and bequeath unto Mary Christine, my beloved wife, all my real estate, to and for her use, during her natural life, for her dowry; and after her decease, I direct the whole to be let out for a yearly rent, the one-third part of which, or if necessary, the one-half, shall be applied by my executors for fencing, and for repairing

Krauss vs. Burt et al.

the buildings, if necessary, and the rest of the yearly rent shall be given yearly to my daughter, Catherine Schenick, to and for her support, during her natural life; and after her decease, the whole real estate to be sold by my executors, and the money to be divided among my grandchildren then living, share and share alike."

Lewis Benner intermarried with Mary Schenick, one of the grandchildren of Adam Holt; and the said Lewis and Mary are still living.

Catherine, the daughter of the testator, died in the year 1808. The real estate mentioned in the will, has been sold by the executor, and the proceeds thereof are admitted to be in the hands of the defendants for the purposes of the present suit, subject to the decision of the Court upon this case.

Lewis Benner became bankrupt, the commission against him bearing date the 2d day of June 1802, and the defendants are his assignees, under the commission. The certificate was duly obtained on the — day of — in 1802.

The said Lewis Benner, and Mary his wife, since the decease of Catherine the daughter of the testator, have regularly conveyed all their interest, under the will of Adam Holt, to Henry A. Ameling, for a valuable consideration, so far as the said Lewis and Mary then had right so to do, and the same is admitted to have been regularly transferred by Ameling to the plaintiff.

The plaintiff and defendants have respectively claimed to recover the legacy in question, from the executor of Adam Holt; and this action is entered by agreement, to take the opinion of the Court, upon the facts stated, which of them is entitled to recover; their rights in this cause being agreed to be the same as though the question were raised in a suit by either party against the executor, or as if a bill of interpleader had been filed by the executor.

Upon these facts, this question is submitted to the Court—

 Krumbein vs. Burt et al.

Is the plaintiff entitled to recover the legacy or share of Mary Bentler, under the will of Adam Holt?

Chauncey, for the plaintiff, argued that the legacy to Mary, the granddaughter, was a mere possibility, and dependent upon her surviving Catherine, and could not have been assigned by the husband, until it vested; though his assignment, for valuable consideration, might have operated as a covenant and bound him in equity. Such an interest does not pass to the assignees, under our bankrupt law, though it would under the strong expressions of the bankrupt law of England, particularly those of the 13 Eliz. and 5 Geo. III. and upon those expressions, all the English cases go. Similar expressions are not found in the bankrupt law of the United States. He cited 2 Atk. 208. 3 P. Wms. 132. 9 Vez. jun. 87. Besides, he contended, that if the estate did pass to the assignees, they should make a provision for the wife.

Rawle, for the defendants, relied upon the English cases to show that the wife's choses in action, and possibilities, pass to the assignees; and contended that our bankrupt law should be construed liberally, to include all that the husband could claim, although it vested in interest, after the certificate. He denied that a provision for the wife could be decreed, except in cases where the aid of a Court of Equity was necessary to the person claiming the wife's property. He cited Cooke's B. L. 264. 290. 296. 1 Brow. 50. 1 Atk. 192. 280. 2 Atk. 420. 4 Vez. 515. 528. 4 Brow. 140. 3 P. Wms. 202. Day's Conn. Rep. 2 vol. 79.

WASHINGTON, Justice, delivered the opinion of the Court. The cases quoted by Mr. Chauncey abundantly prove that a possibility, whether belonging to the husband or wife, would not pass to the assignees of the husband becoming bankrupt, if it were not for the strong expressions used in the English statutes of bankruptcy. The husband may extinguish his wife's choses in action by a release, and he may, in Equity, as-

Krambas vs. Burt et al.

sign away a possibility, to which she is entitled; so far as that, a Court of Equity will compel a specific performance when the right vests, provided the assignment was made for a valuable consideration. But this, which is called an assignment, is nothing more than a covenant, and passes nothing at law. If, however, a specific execution of the agreement may be enforced in equity, then the bankrupt may *part with it*, which brings the case within the statute of 13 Eliz., and more strongly within the words of the 5 Geo. III. But this possibility forms *no part of the estate* of the bankrupt, to which he is entitled in law or equity, of which the commissioners *execute possession*, under the fifth section of the bankrupt law of the United States, nor, consequently, *such* as they could transfer to the assignees under the sixth section: nor is it a debt due to the bankrupt, so as to come within the provisions of the thirteenth section: nor did the estate vest in the bankrupt, previous to his certificate, so as to be embraced by the fiftieth section: nor, finally, is it a debt, duty, or demand, within the fifty-sixth section, upon which the assignees could, *at any time* before the certificate, have instituted a suit.

Why the legislature of the United States, with the English statutes in their view, did not think proper to include contingent interests of this kind, in the assignment of the bankrupt's effects, it is impossible for this Court to say; but it is most clear, that by no construction of the law, however liberal, can this interest of the husband be decided to pass to the assignees.

Judgment must therefore be for the plaintiff.

Mr. Rawle, after the opinion was given, mentioned the eighteenth section of the bankrupt law, which had escaped his attention at the argument. But the Court, after argument, determined that this section related only to a discovery by the bankrupt, and rather seemed confined to dispositions which he had made; but, at all events, it was a proper provision, and did not imply that all the interest which might be disclosed, was

Krumbein vs. Burt et al.

heretofore to be assigned; for, as possibilities and contingent interests might fall in between the commission of bankruptcy and the certificate to which the assignees would undoubtedly be entitled, it was very proper that a full disclosure should be made of expected and contingent, as well as of vested rights. But this section does not require an assignment of such rights, while they are contingent.

Marshall vs. The Union Insurance Company.

MARSHALL vs. THE UNION INSURANCE COMPANY.

The Court granted a new trial, on the ground that new and material evidence had been discovered, which the Court deemed so important, as that the case should be submitted to the jury.

THIS was a motion for a new trial, on the ground that new and material evidence had been discovered since the trial, (*vide* *ante*, page 357.) The new evidence consisted of documents from the custom-house at New-York, tending to invalidate some of the testimony given on the trial, and to show that the sale by the Spaniard was not *bona fide*, but a mere cover, and the goods, in fact, not neutral property.

E. Tilghman, against the motion, stated, that when this case was reached upon the trial list, Mr. Dallas, for the defendant, mentioned, that the commission, which had been received a day or two before from New-York, gave him reason to suspect that further testimony might be obtained from the custom-house, and that he had sent on there accordingly. Upon which, the plaintiff's counsel declined pressing on the trial, and left it to Mr. Dallas, whether it should then come on or not. It was, therefore, now too late to urge this testimony as a ground for a new trial. The defendants had chosen to take the chance of a trial upon the evidence they had, and ought not to be allowed a new one on this new evidence, for the production of which, the plaintiff's counsel had offered to wait. He also contended, that the new evidence was not material, and did not affect the merits of the case.

Dallas, for the motion, replied, that he did not, at the time of the trial, understand the proffered indulgence of the plaintiff's counsel to go so far as Mr. Tilghman did, and as it was merely a suspicion that further testimony might be obtained,

Marshall vs. The Union Insurance Company.

he would not have been warranted in requesting from the Court, or even from the counsel, a continuance of the cause. As to the materiality of the new evidence, he relied upon it as decisive against the defendant.

By the Court. This is a rule to show cause why a new trial should not be granted, upon the ground of material evidence discovered since the trial.

We are satisfied that the newly discovered evidence was not known at the time of the trial, although the defendants' counsel, upon seeing the New-York commission, which only came to hand a few days before the trial, suspected, from some parts of it, that some useful information might be collected. But this would not have been a good reason for continuing the cause; and as the counsel differ, with respect to what passed between them at the bar, we cannot say that Mr. Dallas understood that his opponents would have consented to a postponement, although we are well satisfied, from their declarations, that they would have so consented. But, certainly, he had no ground for insisting upon it.

As to the materiality of the evidence, we cannot positively decide, nor, perhaps, would it be proper now to give a positive opinion about it. It may be explained, but at present it appears, to have a considerable bearing upon the point on which the cause turns, and we think it ought to be submitted to a jury.

Rule, for a new trial, absolute.

Gerbier vs. Emery.

GERBIER vs. EMERY.

The Court refused to grant a new trial, because the defendant would, in the event of the same being granted, compel the plaintiff to submit to a nonsuit in consequence of a defect in the declaration, and thus defeat the justice of the case, unless the Court would allow the plaintiff to amend his declaration, and thus the granting of a new trial would be of no avail. Where, if a new trial should be granted, the defendant could not be allowed in the suit to make the set-off, which, by the weight of evidence he seemed entitled to, the Court refused to grant the same.

THIS was a motion for a new trial.

Hallowell, for the defendant, stated the grounds of his motion to be, first; that the Court had improperly refused to allow him to prove, by a clerk of the Bank, from the books of the Bank, that a check of Gerbier for the amount of the premium on the *Hanny*, had been paid by the Bank. The reason assigned by the Court, was, that as notice had not been given to the opposite party to produce the check, no evidence could be given of it. Their object was to prove, not the contents of the check, but that such a check had been paid by the Bank. Besides, it is not to be presumed that a check is in existence seven years after it is paid. He cited 1 M'Nelly, 343. 1 Winney, 273, 274. Secondly; on the ground of surprise. Thirdly; that the verdict was against the weight of evidence. The defendant had consigned to Gerbier, Bailey, & Co., a cargo of lumber, and they, without authority, sold it upon credit, and neglected to collect the proceeds. The defendant was entitled to credit for the amount, but the jury erred to allow it.

Sergeant, for the plaintiff, was directed by the Court, to confess his answer to the last point. He contended, first; that Gerbier, Bailey, & Co. were authorized to sell on credit. The defendant's letter to them, directs them to sell "to the best ad-

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KLE ET AL.

estate to his wife, during her and his son, with so happen, that his wife reversion of his son's education of his real estate to his son, he left his wife, who the child of a deceased

the estate not specifically in it after the termination was entitled to a moiety

at, to be considered

a, made his last will, z. "In the name of Philadelphia, being my last will and testament, I do give to my

Parker,) all my an- hood, in all my real Philadelphia and district of in her and my dear she presents do enjoin ing her to be careful the country she now happen that my afore- tion, I then give the of — township, same restrictions as education. And as

 Lessee of Pryor vs. Dunkle et al.

I do now possess five different tracts of land in the county of Westmoreland, which will be seen by the patents now in my possession, I do give to my dear son Matthew, to be solely appropriated to his use, and may be sold by his *guardians*, and the money lodged in the Bank of the United States, whenever a favourable opportunity for the sale of back lands shall offer, and then to be sold for his use. In witness whereof I do hereto set my hand, in the presence of us—(and wrote with my own hand,) I give to my granddaughter, Tacy Pryor, to be paid to her out of the income mentioned, thirty pounds per annum, (the daughter of my son Charles, deceased,) the first payment to be made her in one year after my decease.

THOMAS PRYOR.

ANDREW HERTZOG, }
 PIERCE MAHER." }

Thomas Pryor, the deviser, died in 1801. At the time of making his will and of his death, he was seised and possessed, *inter alia*, of the premises mentioned in the declaration, which are of the value of two thousand dollars and upwards. At the time of the testator's death, he left a widow, Sarah Pryor, now Sarah Miles, an infant son called Matthew, by his said wife Sarah, and a minor grandchild called Tacy Pryor, the lessor of the plaintiff, the daughter of his son, (by a former wife,) who was called Charles, and who died in the testator's lifetime. After the death of Thomas Pryor, his said will was duly proved, and the execution thereof committed to his said wife Sarah, who likewise took out letters of administration of the personal estate of the said testator. The said Sarah was married to John Miles the younger, of Philadelphia, on the 6th of December 1802. From the death of Thomas Pryor, to the time of the said last-mentioned marriage, she received the rents and profits of the said testator's real estate, under the will.

Subsequently to the said last-mentioned marriage, viz. on the 1st of January 1803, Thomas Shinn, who is named in the will of the said Thomas Pryor, and John Miles, (the father of the said John Miles the younger,) executed a power of attor-

al.

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Lessee of Pryor vs. Dunkle et al.

But, secondly. It cannot be supposed, that the father intended the half of *the income* which he had given to Matthew, and which was essential for the education he was so desirous that he should receive, should depend upon the widowhood of the mother. The probability is, that the father's intention was, that upon the marriage of the widow, Matthew should take her half of the income also; but as this is not expressly devised over to him, it may be said, there is an intestacy as to this half; and if so, it descended in equal parts to Matthew and Tacy, and the plaintiff will then be entitled to one-fourth of the whole.

Edward Tilghman, in reply, cited many cases, to show, that the heir is greatly favoured; and cannot be disinherited, except by plain words, or necessary implication. As to the construction of the will, it seems plain, that no disposition of the Philadelphia property is made, except of *the income during widowhood*. As to Matthew, what does he take in trust? One-half ~~of~~ *the wife's estate*. What is that? The income *during widowhood*. On the supposition that the son takes one-half the income during life, the trust estate is greater than the legal estate which is to support it. The legal estate failing, the trust goes with it: no new estate is given to Shinn. Suppose the devise had been to the widow *during life*, instead of *widowhood*—should the son take the income after her death? Clearly not. Where a legal estate is granted, and a special trust created, the legal estate will be held sufficient to support it; but where the trust is general, growing out of and depending upon the legal estate, it must fall with the legal estate.

WASHINGTON, Justice, (*Peters* absent,) delivered the opinion of the Court. Were a plain man, such as the writer of this will most certainly was, called upon to give a construction of it, he would probably be astonished to hear that gentlemen learned in the law had been perplexed by it; and he might seek in vain for those difficulties which great talents could alone discover. He would never think of searching after intentions,

 Lessee of Pryor vs. Dunkle et al.

beyond the plain meaning of the words used by the testator; and until he discovered some incongruity in the bequests, or some ambiguity in the expressions, he would adhere to the words, and leave it for more skillful interpreters to explore the field of conjecture. Inquiring, as would be natural, what does the testator give? to whom does he give? and for what estate? he would find no difficulty in saying, that he gives the whole annual income of his real estate in the city and county of Philadelphia and district of Southwark—that he gives that estate to his wife, for the use of herself and her son Matthew—and that he gives it, for and during *her widowhood*, and no longer. But finding that at the close of the will, another person is introduced into the participation of this bequest, to a certain amount, I think he would find no difficulty in removing this clause to that to which it necessarily belongs; and would then say, that the estate is given to the wife during her widowhood, to dispose of as follows, viz. thirty pounds per annum to Tacy, and the residue of the income to be equally divided between herself and her son Matthew. This construction arises necessarily from the words of the will; and I adopt it as a safe one, because I am satisfied that it cannot disappoint the intention of the testator. The devise to the son and granddaughter is of parts of an estate given to the wife during her widowhood, and cannot subsist one moment after that estate is defeated by the happening of the contingency which was to terminate it. The devise, in fact, is to all three, in the proportions mentioned, to continue during the widowhood of one of them; and the constituting that one a trustee for the others, cannot vary the case. As to the residue of the first clause of the will, it is plain, that Thomas Shinn is not substituted as the trustee of the estate before devised, but solely as the guardian of the son. If he was intended to be a trustee, who would be the *cestui que trust*? It was contended for the defendant, that the limitation of the devise to the wife was confined to her legal estate, and does not affect the beneficial interest, which she took under the will.

Lessee of Pryor vs. Dunkle & al.

But it is most obvious, that the testator intended to deprive her of the bequest altogether, upon her second marriage; and he could not well have used more intelligible language, to express such an intention. His object was not only, upon that event, to deprive her of this provision, but to transfer to Mr. Shinn the sole care and direction of his son. But he uses no words which, by any intendment, can be construed to pass the estate to him. If Shinn was constituted a trustee, and the widow forfeited by her marriage her interest in the estate, then an intestacy took place as to a moiety of the income, deducting the thirty pounds given to Tacy; and yet, that the testator did not mean to die intestate, is urged as an argument against the construction contended for by the plaintiff. I presume, however, that the testator thought nothing and knew nothing of the legal consequences of the disposition he had made, in this respect; and the subject of intestacy never occurred to him.

As to the payment to Tacy Pryor of her annuity, becoming due, as was supposed, after her right to it had ceased by the second marriage of Sarah Pryor, this affords no legal objection to her recovery in this action; and upon the whole, I am of opinion that judgment should be given in favour of the lessor of the plaintiff, for one undivided moiety of the lands in the declaration mentioned.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1810.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the
Supreme Court.
Hon. RICHARD PETERS, District Judge.

DILLINGHAM vs. THE UNITED STATES.

An action of debt was instituted in the District Court, upon a recognisance entered into before an alderman of the city of Philadelphia, in a case in which a party was charged with having beaten a boy so as to cause his death, on board a merchant vessel of the United States, in the harbour of Flushing. The recognisance was in these words and figures: "July 22d, United States vs. Jasper. James Jasper and S. Dillingham, each tent in \$300, for the appearance of said Jasper," taken by me R. Wharton, and signed by the parties. The United States had judgment below, and the cause was brought, by writ of error, into the Circuit Court.

In a recognisance, the material parts of the obligation and the condition, should be set forth in the body of it, so as to admit of extension, consistently with the terms of it.

It is essential to a breach of the condition of a recognisance, that the party who is to appear, should be solemnly called before his default is entered, and in an action on the recognisance, it should be clearly proved that the party was called and warned, and neglected to appear.

Query, if the nonappearance of the recognisor can be proved by parol evidence.

A material variance between the warrant and the recognisance set forth in the declaration, and that given in evidence, is fatal.

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Dillingham vs. The United States.

evidence the aforesaid warrant, with the recognisance thereon endorsed, and also the evidence of Robert Wharton, the magistrate who took the recognisance, to prove that the said J. Jasper did not appear before him, the said Robert Wharton, at the time for that purpose appointed by the said paper; upon which evidence the Judge charged the jury, that if they, as a matter of fact, were of opinion that the said paper so produced in evidence, was the recognisance and condition mentioned in the declaration, then, that the said several matters so produced in evidence, and proved on the part of the United States, were sufficient to maintain the issue on behalf of the United States: to the admission of which evidence and charge, the defendant took a bill of exceptions. The jury found for the United States, and judgment was given on the verdict.

Reed and Sergeant made the following objections to the judgment below. First; variance between the writ appearing in the record, which is for three hundred dollars, and that set out in the declaration, which is for six hundred dollars. Cro. El. 198. 829. 6 T. Rep. 633. Cro. Ja. 108. Tidd, 112.

Secondly; variance between the recognisance and the declaration; the former stating the charge to be murder, and the latter battery only.

Thirdly; the recognisance declared on, is with condition to answer for an offence against the laws of the United States, whereas, the recognisance does not so describe it. On the subject of variance, were cited 1 Ld. Ray. 84. 2 Idem, 756. 1 Cra. 290. 2 Ld. Ray. 966. 3 Cra. 229.

Fourthly; the magistrate had no right to take bail, to appear before himself *de die in diem*, but should have committed him until the examination was closed, or given him into the custody of the officer, who might have retained him a reasonable time. Even if in a bailable case, such a recognisance could be taken, still, a state magistrate could not take it in a case where the charge was murder. 33d sec. of the Jud. Law, passed 24th September 1789.

Dillingham vs. The United States.

Fifthly; it does not appear that the accused was called, or his default entered by the magistrate; and parol evidence, to fix the forfeiture, was improper.

Cases cited in support of the fourth objection, 3 Hawk. 208. 2 Hale, c. 14. 585. Cro. El. 829.

Dallas, for the defendant, cited the case of the state of Pennsylvania vs. Emery, in the Supreme Court of this state, to show that recognisances, taken like the present, are good.

The warrant is to answer the United States, and this is referred to by the recognisance; besides which, the latter, in the caption, is "the United States vs. J. Jasper."

The warrant states an assault and battery, as is stated in the declaration; and the consequent death, stated in the former, is no part of the charge.

As to the nature of the offence, it might have turned out to be manslaughter, and of course, until the examination, the magistrate could not say that the punishment might be death; and, therefore, he was, in that stage of inquiry, authorized to bail. But, at all events, the law is but directory to the magistrate, and though he take bail where he should not, the recognisance is good.

As to the right of the magistrate to take bail, to appear from day to day, this was done in Burr's case. See his trial, page 3. Cases cited, as to taking bail, 3 Haw. 212. B. c. c. 15. s. 63. *Idem*, 203. B. 2. c. 15. s. 46.

In reply, was cited 4 Black. 200, 201, to show that all homicide is presumed to be malicious, until the contrary appears.

WASHINGTON, Justice, delivered the opinion of the Court. Many objections have been stated to the judgment of the District Court, of which two only will be noticed. It is contended, that an examining magistrate cannot take bail to appear before himself from day to day, and that if he can, still the recognisance must be in regular form, and must be proceeded in as other recognisances are. But in this case, it is said a

Billingham v. The United States.

state magistrate could not take bail for the appearance of the party, either at the Court to which the recognisance was to be returned, or before himself, for the purpose of further inquiry into the nature of the offence; because the warrant contains a charge of murder, the punishment of which is capital.

On the other side, it is insisted that practice, as well as the reason of the case, sanctions the liberation of the accused, upon bail, until the magistrate shall have decided upon the character of the offence; and that, at all events, the prohibition to the magistrate to take bail, in a capital case, is but directory to him, and that his error in judgment cannot have the effect to avoid the recognisance which he has taken. That the recognisance need not be taken in regular form, but it is sufficient to make a minute of the undertaking, which may be extended, and the chasms in form, supplied by the declaration.

Admit the correctness of this argument upon the part of the United States, as to which no opinion is meant to be given, it may safely be laid down, that to avoid rendering a recognisance to appear before the examining magistrate, an anomaly in judicial proceedings, as close an analogy between such a recognisance and the common one to appear at the Court to which it is returned, should be observed, as the nature of the case will admit. The material parts of the obligation and of the condition, should be so set forth in the body of it, as to admit of extension, consistently with the terms of it, and the proceedings to establish and to recover for a breach of the condition, should be substantially the same as if it had been a recognisance in common form, to appear before the Court where the trial is to be had.

Considering the recognisance in this light, and thus qualified, the judgment in this case is exposed to at least one of the objections taken to it by the plaintiff's counsel, which has not, and we think cannot be obviated, which is, that the for-

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seizure was not even proved at the trial to have been legally incurred. For we hold it to be essential to a breach of the condition, upon which the forfeiture is to arise, that the party who is recognised to appear, should be solemnly called before his default is entered; and even if the default can be proved by the parol evidence of the magistrate before whom the appearance was to be, which we very seriously question, it should clearly be proved that the party was called and warned, and neglected to appear. This is far from being a matter of form only, but, on the contrary, it is a humane provision to prevent a forfeiture accruing from the ignorance or inattention of the accused; and if, by the regular proceedings in Courts of justice, it has been deemed right to call such person, and to warn him and his sureties of the consequence of his nonappearance, it will not be an easy matter to suggest a reason why this solemnity should be dispensed with by the magistrate, in a case precisely analogous. Mr. Wharton, the magistrate who took this recognisance, proved only that J. Jasper did not appear before him on the day mentioned, and yet, for aught that appeared to the contrary, he might have been present at the office of the magistrate on that day, and failed to make it known from an ignorance of the time and manner of doing it. We understand the meaning of the undertaking to be, that his appearance shall be a legal one, that is, to appear when he is called. We think, therefore, that the District Court erred, in the opinion which was delivered to the jury.

It is also the opinion of this Court, that there is a material and fatal variance between the warrant and recognisance given in evidence, and the recognisance set forth in the declaration. Connecting those two papers together, which the reference in one to the other renders necessary, the charge which the accused bound himself to appear and answer to, was a cruel battery inflicted upon the boy, of which he languished, and shortly after died; a charge which, if proved, and not pal-

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liated by exculpatory evidence, would have amounted to the crime of murder; whereas, the offence stated in the declaration, could not amount to any thing beyond a trespass. The evidence, therefore, being altogether different from the allegation, it ought not to have been received.

The judgment, therefore, must be reversed.

The King of Spain vs. Oliver.

THE KING OF SPAIN vs. OLIVER.

It is a power which belongs essentially to every Court, to superintend the conduct of its officers, to see by what authority they act, and that its process shall not be vexatiously employed.

If the defendant insist upon it, the plaintiff's attorney must file his warrant. The Constitution of the United States gives jurisdiction to the Courts of the United States, in cases where foreign states are parties; and the Judicial Act gives to the Circuit Court, jurisdiction in all cases between aliens and citizens.

The Court refused to inquire, upon a motion, whether Ferdinand VII. king of Spain, could institute this suit, the government of the United States not having acknowledged him king.

TWO rules were obtained by the defendant; the one for the plaintiff's attorney to file his warrant of attorney; and the second, to show cause why the proceedings should not be stayed, the plaintiff not being qualified to sue in this Court.

The first rule was argued distinct from the second; when it was contended, by Hare and Tilghman, in support of the rule, that upon legal principles, as well as upon the practice as understood in this state, the attorney, if called upon, must produce his authority to appear. The stat. of 18 Hen. 8. c. 9. 38 Hen. 8. c. 30. s. 2. 18 Eliz. c. 14. 4 Anne, c. 16, s. 3, and the Act of Assembly of this state, passed 22d May 1722, all of them requiring the attorney to file his warrant of attorney, when he declares or pleads under a certain penalty, were referred to. The case of the King of France vs. Morris, in the Supreme Court of this state, where the plaintiff's attorney, after argument, was required to file his warrant, and many other cases, where the same demand had been made and submitted to without argument, were mentioned. The following cases were also read: 1 Com. Dig. 624. 626. 3 Hawk. 377. 1 T. Rep. 62. Crompton Proc. 18. 1 Tidd, 470. 2 Dall. 142. 7 Bae. Ab. 7. 2 Instit. 606.

The King of Spain vs. Oliver.

Dallas and Rawle contended, that in England, the filing warrants of attorney had gone into disuse. 1 Salk. 19. 1 Wils. 101: 1 Sellon, 20; and the remedy is against the attorney. But that, at all events, the rule was premature, as the attorney, under the statute of this state, was not compellable to file it until he declares.

WASHINGTON, Justice, delivered the opinion of the Court. We think that this rule must be made absolute; for it would be strange, if a Court whose right and whose duty it is to superintend the conduct of its officers, should not have the power to inquire by what authority an attorney of that Court undertakes to sue or to defend, in the name of another—whether that other is a real or fictitious person—and whether its process is used for the purpose of vexation or fraud, instead of that for which alone it is intended. The only question can be, as to the time and manner of calling for the authority, and as to the remedy, which are in the discretion of the Court; and ought to be adapted to the case. This right, which is inherent in all Courts, may be taken away, or qualified by express statute; or additional cautions may be superadded; in which latter view, we consider the different statutes, and the Act of Assembly of this state, which were referred to. These laws do no more than punish the attorney, for failing to file his warrant at a particular time; and yet, if filed at any time afterwards when required, we would hardly be contended that the penalties would incur. The object of the Court, in the exercise of its superintending power over its officers and its process, is to protect the parties, although it may go further, and punish the officer for misbehaviour. The statute fixes a particular time when the warrant is to be filed, in relation to the penalty imposed upon the attorney. But the Court, not deriving its right to interpose under the statute, will at the threshold inquire, by what authority the suit is instituted; and being satisfied, either by the production of the warrant of attorney, or by any other, even parol evidence,

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that the attorney acts by authority, will not in a summary way arrest the proceedings. If it were necessary to wait until the declaration were filed, the interference of the Court would but half effect the object of it. The plaintiff is not compellable to file his declaration at the first term. The defendant may be held to high bail, by an attorney who may be able to show cause of action, and yet not be authorized to sue; or if no bail be required, it may be the wish and the interest of the defendant to question the plaintiff, and to bring the cause to an early issue. Yet, if the plaintiff's attorney file his declaration, and refuse to file his warrant also, the defendant must wait under a rule to plead, possibly, until the succeeding term, in order to call for the warrant of attorney; for, after issue joined, it seems by the case cited from Dallas, it is too late to ask for the rule.

Upon the reason and nature of the case, therefore, and the positive decision of the Supreme Court of this state, in one instance, and the tacit admission of the practice in many others, it is the opinion of the Court, that the plaintiff's attorney must produce his authority for bringing this suit.

First rule made absolute.

In relation to the second rule, it was contended by Hare and Tilghman, in favour of the rule, that the municipal Courts of one country cannot entertain jurisdiction of a suit brought by a foreign sovereign, more especially one who is not acknowledged by the government of the country where the suit is brought; and still stronger, where the sovereign in whose name the suit is brought, is not in possession of his government. If so, it is proper for the Court to stay the proceedings at once, and not put the defendant to plead. They cited, Tidd, 470. 9 Vez. 347. 10 Idem, 352. 11 Idem, 273. 1 Dall. 77. 2 Ld. Ray. 1533. 3 Vez. 424.

Rawle and J. R. Ingersoll, contra, cited Rose vs. Horneby, in the Supreme Court. 2 Vez. Jun. 56. 1 Idem, 371. 3 T. Rep. 731. 3 Brow. C. R. 292.

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By the Court. Without going through the English cases which have been cited, it is sufficient to observe, that the Constitution of the United States gives jurisdiction to the Courts of the United States, in cases where foreign states are parties; and the Judicial Act gives jurisdiction to the Circuit Courts, in all cases between aliens and citizens. Whether this suit can be supported, if prosecuted in the name of the King of Spain, generally, or whether Ferdinand VII. can support the action before he is acknowledged by our government, are questions not proper to be decided on motion.

Rule discharged.

Assignees of Medford vs. Dorsey.

ASSIGNEES OF MEDFORD vs. DORSEY.

If there was error in entering a judgment, the Court, at a subsequent term, cannot set it aside, unless it was entered by misprision of the clerk, by fraud, or the like.

THIS cause had been referred to arbitrators by rule of Court, who made a report in favour of the plaintiff, for 1850 dollars, provided the plaintiff should give to the defendant a bond of indemnity against Holt & Co. and two or three other persons. The report was returned, about four years ago, and it appears by the records, that, on motion, it was confirmed and decreed.

The defendant now obtained a rule to show cause why the judgment should not be vacated, the judgment having been improvidently entered, until the indemnity was given, and by which it appeared, upon showing cause, the agent of the plaintiffs (they living in England) had refused to give or to receive the sum awarded, on the condition prescribed. It also appeared, that Holt had recovered, and been paid by the defendant, 1000 dollars, of the sum for which the indemnity was to be given; and other suits were now depending.

WASHINGTON, Justice, (*Peters* absent.) This judgment, having been entered at a former Court, though probably improvidently done, and might have been refused, had it been opposed, until the indemnity was given, cannot now be vacated. If there was error in entering it, the Court, at a subsequent term, cannot set it aside, unless it was entered by the misprision of the clerk, by fraud, or the like. It is a hardship upon the defendant, to have his real estate bound by a judgment

Assignees of Medford vs. Dorsey.

which it is improbable will ever be enforced; and there is possibly no way to help the defendant, but by entering satisfaction on the judgment, whenever it is made to appear, that the sum awarded has been paid to those against whose claims the defendant was to be indemnified.

Rule discharged.

The United States *vs.* Hand.

THE UNITED STATES *vs.* HAND.

Indictment for an assault upon the *chargé d' affaires* of Russia, and for infracting the law of nations, by offering violence to the person of the said minister.

When the minister had a large party at his house, and a transparent painting at his window, at which a mob who had collected took offence, the defendant fired two pistols at the window, his intention being to destroy the painting, without doing injury to the person of the minister, or of any one.

An assault is an offer or an attempt to do a corporal injury to another, as by striking at him with the hand or with a stick, or shaking the fist at him, or presenting a gun, or other weapon, within such distance as that a hurt might be given; or drawing a sword, and brandishing it in a menacing manner—each of those acts to be done *with intent to do some corporal hurt to another*.

The law of nations identifies the *property* of the foreign minister, attached to his person, or in his use, with his *person*. To insult them, is an attack on the minister and his sovereign; and it appears to have been the intention of the Act of Congress, to punish offences of this kind.

To constitute an offence against a foreign minister, the defendant must have known that the house on which the attack was made was the domicile of a minister; or otherwise, it is only an offence against the municipal laws of the state.

INDICTMENT.—The first count contains a charge of an assault upon the person of Mr. Daschkoff, the Russian *chargé d' affaires*; and the second, for infracting the law of nations, by offering violence to the person of the said minister. The defendant pleaded not guilty.

The evidence was, that on the night of the 26th of March, the minister, with a view to celebrate the coronation of his sovereign, invited a large party to his house; and from a desire to compliment the persons without, and to evidence the friendship between his government and this, placed at one of the

The United States vs. Hand.

windows of his drawing-room on the second floor, a transparent painting, which represented a vessel under the American flag entering a port of Russia, above which was placed a crown. The people without, misunderstanding the design of the painting, and the intention of the minister in exhibiting it, took offence at the crown, and particularly at its position over the American flag. A large crowd collected, many threats to pull it down were clamorously made, and some bricks and stones were thrown at the house. Some of the gentlemen from the house went out to explain the matter to the mob, and endeavoured to pacify them, but in vain. They promised, however, that they would be satisfied if the minister would take down the crown, and agreed to give a certain number of minutes for this to be done. In the mean time, the defendant, with a Mr. Henderson, having left the theatre between 11 and 12 o'clock, attracted by the illumination, went to see what it was. Hand and Henderson soon separated in the crowd, the latter exerting himself to pacify the people. Some short time afterwards, the defendant, who lived in Fifth street between Market and Arch, was seen coming from Seventh street, in Chesnut, to the crowd opposite the minister's house, between Seventh and Eighth streets. He carried in each hand a large pistol, and, coming opposite to the house, in less than two minutes fired one pistol at the illuminated window, and immediately after the second. At this time, the minister and one of his domestics were in the window, extinguishing the lights, in compliance with the wishes of the mob; and the bullet from the pistol first fired, passed into the room, through the window, over their heads. The company fortunately was below stairs, at supper, when the pistols were fired. The defendant was proved to have been considerably intoxicated, and was taken, by his friends, to a friend's house, where, being informed of the insult done to the Russian ambassador, he declared he did not know it was his house; which he afterwards repeated. No proof was given, that he had this knowledge.

The United States vs. Hand.

WASHINGTON, *Justice*, charged the jury. The indictment contains two counts, or charges, upon which the jury must pass; and I shall therefore consider them distinctly.

The first is for an assault upon the Russian minister, against the provisions of the Act of Congress. The definition of an assault, (a) is an offer or attempt by force to do a corporal injury to another; as if one person strike at another with his hands, or with a stick, and misses him; for, if the other be stricken, it is a battery, which is, an offence of a higher grade. Or if he shake his fist at another, or present a gun, or other weapon, within such distance as that a hurt might be given; or drawing a sword, and brandishing it in a menacing manner. But it is essential to constitute an assault, that an intent to do some injury should be coupled with the act; and that intent should be to do a *corporal* hurt to another. Apply these principles to the evidence in the cause. The intention of the defendant most clearly was, to destroy, or, as he termed it, to take down, the crown, which his heated mind had construed into an insult to the service of which he was a member. His whole conduct showed that his intention was not to do a personal injury to any one, and certainly no act was done in the smallest degree indicative of such intention. The outrage of which he was guilty, must be reprobated by all good men, and deserves to be punished; but it did not amount to an assault upon the Russian minister, which is the offence charged in the first count of the indictment. Upon this count, therefore, the jury ought to find him not guilty.

The second count charges him with infracting the law of nations, by offering violence to the person of the minister. Here again, the difficulty recurs, which has been noticed under the first count. How can an attack upon the house of the minister, without an intention to injure the person of the minister, be an offer of violence to his person? Upon common law

(a) 1 Bac. Ab. tit. Assault, 242.

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principles, such evidence would seem inapplicable to such a charge. But the Act of Congress refers us to the law of nations for our test; and if the act amount to the offer of personal violence, by that law, the charge is supported. That law, with respect to offences committed against ambassadors, &c., identifies the property of the minister, attached to his person, or in his use, with the person of the minister. The expressions of Vattel are very strong: "His house, carriage, equipage, family, &c. are so connected with his person, as to partake of the same fate with it. To insult them, is an attack on the minister himself, and upon his sovereign. It is an insult to both." (a) All this is a legal fiction, for the purpose of rendering the protection to which the minister is entitled full and complete, and to guard him, as well against insults, as real personal injury. It is not more extravagant than the fiction which considers the minister, his house and property, out of the country, for the purpose of ousting the jurisdiction of the tribunals of the country over him. Nor is it more strange than that which once prevailed in our law, though long since overruled, that provoking words alone would amount to an assault. Moreover, it seems pretty clear, that offences of this sort were intended to be covered by the general expressions of the 27th section of the law to punish crimes. The preceding part of the section had specified four distinct offences, the lowest of which is an assault; and it is difficult to imagine any directly against the person of the minister, which can be lower. But Congress knew that there were many other injuries which might be offered to a public minister, and which the law of nations considered as being indirectly attacks upon his person, and, without attempting a further specification, covered under general expressions all such as were deemed by the law of nations to be offences against the person of the minister. Without such a construction, it will be difficult, if not impossible, to imagine cases of

(a) Vattel, 618. 715. 719, &c.

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violence against the person, to satisfy the general words, which are not included in these that are specified in this and the two preceding sections.

But, to constitute this an offence against the law of nations, the defendant must have known that the house upon which the violence was committed was the domicile of the minister; or otherwise, it is merely an offence against the municipal laws of Pennsylvania; and this is the only point of consequence for you to decide. Without giving any opinion upon the evidence, I shall content myself with presenting it fairly to your view.

It is always difficult, and frequently impossible, to bring home to any man the knowledge of a fact, by positive proof; and therefore, it may fairly be collected from circumstances. But these circumstances should be legally proved, and should be sufficiently strong to satisfy the mind that the fact was known. In favour of the defendant, his declaration, immediately after the outrage was perpetrated, that he did not know that it was the house of the minister, made in a state of mind when caution and reflection were not to be expected, and that, at different times afterwards, confirmed by similar declarations, have been much relied upon by his counsel. The denial of the accused is certainly the lowest species of proof; but it may be sufficient to repel slight evidence to fix him with a knowledge of the fact. On the other side, the defendant lived in Philadelphia; and if he had not obtained by this means a previous knowledge of the residence of the minister, the occasion which drew him to the spot, the novelty of the sight, the appearance of a crown, the general irritation of the crowd, and of the defendant in particular, at its position, were all calculated to excite inquiries, which it is proved by the witnesses could at once have been answered. It appears that some of those who went there ignorant that this was the house of the minister, soon gained information of the fact. One of the gentlemen from the house had addressed the crowd, and explained to them the occasion of the illumination, and the impropriety of their conduct upon

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the occasion. If it had been proved that the defendant was one of the crowd at this time, the evidence against him would be complete. But it seems very probable, that soon after his first coming to the place, and possibly before this explanation was given, he had gone away in pursuit of his pistols; and it is in proof, that almost immediately upon his return, he fired them. It is possible also, from the state of intoxication in which he was, that he did not wait to make inquiries.

As to this fact, upon which the cause turns, the jury must judge. If they are satisfied, upon the evidence, that he knew this to be the residence of the minister, they ought to acquit him under the first count, and find him guilty under the second. If otherwise, find him not guilty, generally.

Verdict, not guilty.

Philips et al. vs. Crammond et al.

THOMAS PHILIPS & Co. vs. WILLIAM CRAMMOND, WILLING,
AND OTHERS, TRUSTEES FOR THE CREDITORS OF CRAMMOND
AND SAMUEL MIFFLIN.

The general principle of equity is, that if a receiver, executor, factor, or trustee, lay out the money which he holds in his fiduciary character, in the purchase of real property, and take the conveyance to himself, he who is entitled to the money may follow the same, and consider the purchase as made for his use, and the purchaser as his trustee.

A resulting trust will arise, where lands have been purchased by one partner, and paid for out of the funds of the partnership.

The confession of the party in his answer to a bill, or in writing under his hand, that the money laid out belonged to the person, is sufficient evidence thereof.

The person entitled to the resulting trust, is not obliged to take the land, and to consider the purchaser as his trustee; but he may elect to take the money, and refuse the property.

Equity will not raise a use by implication, for a person who by law cannot hold it.

Where the equity of each party is equal, the Court will not deprive one party of the advantage he may have gained, by obtaining a legal estate in property, which was promised as a security for a debt due to each.

THIS case was argued in April or May 1809, when the commissioner of the Court was directed to state the accounts between the plaintiffs and Crammond, at certain periods, and also the manner in which the entries, respecting the estate called Sedgely, the estate on Spruce street, and the vessels, were made on the books of Philips, Crammond, & Co., kept by Crammond. The report was made, and excepted to, but not argued, or deemed important. The Court now pronounced an opinion and decree in the case.

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WASHINGTON, Justice, (Peters, Judge, did not sit.) It appears from the bill and answers in this cause, that some time in the year 1789, a commercial house was formed and established in Philadelphia, between the complainants, of Manchester in England, and the defendant, Crammond, in this city, in which the latter was to be one-third interested, and was to manage the affairs of the concern. This copartnership continued until December 1801, when it was dissolved. During its continuance, viz. in January 1795, Crammond, with the consent of his partners, purchased a lot of ground in Philadelphia, on Spruce street, and built thereon a dwelling-house and warehouses, for the use, and with the funds of the partnership, but took the conveyance in his own name. As to this property there is no dispute, it being admitted to be partnership property when purchased, and a declaration of trust to the complainants having been since made.

On the 28th of March 1799, Crammond purchased a piece of ground on the Schuylkill, containing about twenty-eight acres, upon which he built a house for a country seat, and in other respects improved the same at considerable expense, to which he gave the name of Sedgely. The purchase money for this property, and what was expended in improving it, was also drawn from the partnership funds, and the conveyance was made to Crammond alone. The first payment was made in the autumn of the same year.

There were also a number of vessels employed in carrying on the trade of this concern, the whole of which were held in the name of Crammond, and as his separate property, though purchased and paid for out of the joint funds.

It would appear that this company carried on their trade with various success, but that for some time before the dissolution, their losses were considerable, insomuch, that upon the final settlement which took place in December 1801, Crammond was found to be debtor to the house in a considerable sum. Previous to this settlement, and as early as the 11th of September pre-

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ceding, Crammond, by letter to the complainants, informed them that he had, on that day, executed a deed of trust to them for all the real estate in his name, stating, that it belonged to them, and that the complainants had then in their hands sufficient proof that the property was theirs. On the 30th of December 1801, he executed a declaration of trust, in favour of the complainants, of the Spruce street property only, nor was any conveyance or declaration of trust at any time made in their favour, in respect to Sedgeley. He afterwards agreed to hold this latter estate as a tenant to the complainants, at a certain rent. He has always, since that time, acknowledged that Sedgeley belonged to the complainants, and in his answer he confesses the same, and that it was purchased and improved with the partnership funds.

After the dissolution of the partnership, Crammond carried on business in his own name, and on his own account, until May 1805; when he stopped payment, and executed to three others of the defendants, a deed of assignment of all his real and personal estate, for the benefit of his separate creditors. Some time after this, Sedgeley was levied upon by the Marshal of this Court, to satisfy an execution issued upon a judgment obtained by the United States against William Crammond, and was sold and conveyed to the remaining defendant, Samuel Mifflin, who, in his answer, states that he is not bound to pay the purchase money, unless it shall appear, by due course of law, that the said estate was the property of Crammond, at the time the judgment was obtained.

It appears, that during the partnership of Philips, Crammond, & Co., the accounts of the concern, under the management of Crammond, were annually transmitted by him to the complainants, upon which the profit and loss were ascertained, and Crammond's proportion of profit was carried to his credit, and remained with the concern, as so much of his capital brought into the partnership stock.

By the report of the commissioner of this Court, it appears,

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that on the books of the company kept by Crammond, an account was opened with each vessel purchased by him with the partnership funds, in which she was debited with the purchase money, and with her expenses and interest on such expenditures, and was credited with her earnings, and that upon the final disposition of such vessel, her account was closed, and the balance carried to the debit or credit of William Crammond. That in the same accounts, the Spruce street property is designated as "the estate on Spruce street," and the advances made on account of it are not charged with interest. That the accounts, as to this estate, are regularly continued in these books after the dissolution, and Crammond is individually debited and credited with sums expended by, or received from him on account of that estate, and is, at different times, before and after the dissolution, charged with the rent thereof. The Sedgeley estate, on the other hand, is in the same accounts called, "William Crammond's estate, Sedgeley," and in the balance sheet of 1800, sent to the complainants, amongst the debts owing to Philips, Crammond, & Co., Crammond is charged for sundry ships, and for the estate, called *Sedgeley*. The advances made for this estate, are charged with interest, and the account is balanced on the books, on the 31st of December 1801, with 43,096 dollars, against the estate, as to which no further entry is made until the 31st of December 1806, when rent for the same, for the four preceding years, is charged to Crammond, by whom all the intervening expenditures were paid.

Upon this state of the case, the question is, whether the prayer of the bill, which is for a conveyance of the Spruce street and Sedgeley estates, ought to be granted? Their right to the Spruce street estate being admitted by the defendants, and rightly so in the opinion of the Court, a decree in favour of the complainants, as to that, will of course be made.

The merits of the claim, as to Sedgeley, stand upon different ground; and the first question, as to that, is, whether under all

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the circumstances of this case, a trust resulted to Phillips, Crammond, & Co., out of whose funds that property was purchased and improved? The general principle is, that if a receiver, executor, factor, or trustee, lay out the money which he holds in his fiduciary character, in the purchase of real property, and take the conveyance to himself, he who is entitled to the money, which has been thus invested, may follow the same, and consider the purchase as made for his use, and the purchaser a trustee for him. Upon the same principle, I conceive that a resulting trust would arise to a partnership concern in lands purchased by one of the partners, and paid for out of the joint funds. As to the proof of the fact upon which this equity will arise, it seems to be settled, that if the purchaser confess in his answer, or in writing, under his hand, that the money so laid out, was the money of the person claiming the benefit of the purchase, it is sufficient to establish a resulting trust. Some of the cases, indeed, have gone farther, but it is unnecessary, in this case, for the Court to go farther, as that fact is confessed by Crammond, in his answer, and is acknowledged in one of his letters.

But this species of resulting trust is open to certain qualifications, amongst which it is proper to notice the following, viz.: that the person whose money was invested in the purchase, is not obliged to take the land, and to consider the purchaser as his trustee, but may elect to treat him as his debtor, and to claim the money instead of the property. As a consequence of this, and because the claim to a resulting trust is merely that of an equity, founded upon the presumptive intention of the parties, that equity may be rebutted, even by parol evidence, and circumstances to defeat it. If, for instance, the person for whose benefit the trust would otherwise be created, declares that the purchase was not made for him, or if both parties treat it as a purchase for the use of him to whom the conveyance is made, no resulting trust will arise.

This qualification of the doctrine seems to be decisive of the

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But there is another reason why a resulting trust could not arise to the complainants, which is; that at the time the purchase money for Sedgely was paid, the complainants were aliens, and incapable of holding real estate in Pennsylvania. The Act of the 11th of February 1789, permitting aliens to purchase and to hold real estates, expired some time in the year 1797, prior to the time when this purchase was made. The Act of the 11th of April 1799, goes no farther than to save the rights, *intermediately* acquired by aliens, under any *bona fide* contract, patent, or deed. But since it is unquestionable, that the payment of the money can alone create a resulting trust, which, in this case, was not done until after the conveyance was made to Crammond, the purchase in March 1799, cannot be considered as a contract made for the benefit of the partnership, within the words or intention of this law. This being the case, equity will not, by implication, raise a use for a person, who, by law, is incapable of holding.

If, then, the complainants' claim cannot be supported upon the ground of a resulting trust, are they entitled to call for a specific execution of the agreement of Crammond to stand seised of Sedgely to their use, supposing the objection of alienage out of the way? This agreement is in writing, and being made upon a valuable consideration, there would be no difficulty in decreeing a conveyance by William Crammond, if the question were only between him and the complainants. But the claim of the trustees for the general creditors of Crammond is interposed, and they being also purchasers for a valuable consideration, they have equal equity with the complainants. If it is true, that the equity of the complainants is prior to that of the trustees, and would of course prevail against them, if the question were, which of them is entitled to call for the legal estate? Or if the complainants had lent their money, on a promise by Crammond to give a mortgage for its security, or to convey the property absolutely to them, they would have had superior equity, and the Court would have considered the latter

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as trustees for them. But in this case, the promise made to the complainants, and the conveyance actually made to the trustees, both being in consideration of pre-existing debts, the equity of each is equal, and this Court will not take from the trustees the legal advantage, which their vigilance has conferred upon them.

Nothing need be said as to the title of Mifflin, or, indeed, can be decided upon the evidence in this cause. If the right of the trustees be better than that of the complainants, the latter cannot succeed.

Decree, that Crammond convey the Spruce street property to the complainants, and that the trustees release all their right and claim on the same. Bill to be dismissed, as to Sedgely, but without costs.

Talcott vs. The Delaware Insurance Company.

TALCOTT vs. THE DELAWARE INSURANCE COMPANY.

The copy of a record of the condemnation of the property insured, was offered in evidence without the seal of the officer who made out the copy; but there were on the margin of each page, flourishes with the pen. No proof was given, that the officer had or had not a seal. The Court rejected the evidence.

A copy of the manifest of the cargo taken in at Havana, and certified, without a seal, by a notary, with a certificate, signed by three notaries, that full faith and credit ought to be given to the acts of their associate, was not permitted to be read in evidence, because it did not appear that the notary had charge of these papers, and authority to authenticate them.

The bill of lading is evidence of interest; and the jury, in the absence of an invoice, can easily estimate the value of the cargo.

THIS was an insurance on goods, dated July 9th 1806, on board the schooner Commerce, at and from Havana to New-York; premium, $3\frac{1}{2}$ per cent.; warranted American property, to be proved at Philadelphia. The vessel sailed on the voyage insured, and on the 1st of July, was captured by a Spanish privateer, and carried into St. Augustine. One of the counts is for a loss by capture, and the other by barratry of master. Policy open.

After evidence was given tending to prove the fraudulent misconduct of the master, to which the loss was imputed, and contrary evidence on the part of the defendants, the record of the proceedings in the tribunal at St. Augustine, was offered in evidence by the defendants.

On the former trial of this cause, the Court rejected this evidence, upon the ground that the sentence and proceedings, and all the original papers, were in the superior Court at Havana, to which the cause had been adjourned; and that this transcript was nothing more than the copy of a copy. A juror

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was withdrawn, to enable the defendants to obtain better evidence of the proceedings. This, however, they had not done; but relied upon the evidence of Mr. Duponceau, who stated the practice of these Courts to be similar to that of the Courts of the United States, where, upon a division of the Circuit Court, the question is adjourned to the Supreme Court. So, upon a similar division of the tribunal at St. Augustine, the case is adjourned to the superior Court at Havana, to which all the papers are sent, and the cause is there finally decided and returned with the papers to the Court at St. Augustine, and a mandate to execute the sentence: but Mr. Duponceau admitted, that his information was obtained, not from his own knowledge of the practice and judicial system of the Spanish colonies, but from this record, and similar records which he had seen. Another witness deposed, that he was sent by the defendants to St. Augustine, to obtain information respecting this capture, and also to procure a record of the proceedings: that he got this record by petitioning the governor, and his permit to the notary of the government, who signs and attests this record: that he saw the original papers in his office, was frequently there whilst the officer was copying them, and saw him sign this copy: that he did not know if this officer had a seal, or not; he requested him to authenticate the copy in proper form, and received it as it now appears, without a seal, but with a peculiar flourish of the pen, which is also made on the margin of each page.

The objection now made to the record, is, that it is not authenticated by a seal, or the want of a seal by the officer proved.

The Court considered the case of Church & Hubbard conclusive upon this point, against the authenticity of the record. The explanation of the witnesses seems to remove the objection made at the last trial; but the record not being authenticated by a seal, or by proof of its being a true copy, properly and regularly made, it cannot be read.

The defendants offered in evidence a copy of the manifest of

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the cargo of this vessel, taken in at Havana, certified under the hand of an officer, called a notary of registers, without a seal, with a certificate annexed, signed by three notaries, under the seal of the college of notaries, stating that full faith and credit has and ought to be given to the authentications of the notary of registers. This notary certifies, that the paper which he authenticates, is a copy of the manifest of this vessel, made by him at the request of Don Mora, and which is at present in the notarial office, under his charge.

Mr. Duponceau was examined as a witness, and stated, that from his experience, and having frequently seen copies of papers of this kind from the Spanish colonies, they are always authenticated in this way; but he admitted that he had never been in the Spanish colonies, and that he derived his opinion from no other source than that above mentioned.

The Court thought the evidence inadmissible. It does not appear that this notary has charge of these papers, and that he has authority to authenticate them. The copy should have been proved, in the regular way, to be a true copy.

The defendants moved for a nonsuit; there being no invoice produced of the cargo, and the bill of lading furnishing no evidence of plaintiff's interest, or the value of it.

The Court refused to direct the nonsuit. The bill of lading is evidence of interest, and the jury can say, what is the value of the boxes of sugar and segars mentioned in it.

The defendants then permitted the jury to find a verdict, without further argument; intending to move for a new trial.

Marshall vs. The Union Insurance Company.

MARSHALL vs. THE UNION INSURANCE COMPANY.

The whole record of the proceedings of the Admiralty Court in which the property insured was condemned, cannot be read in evidence, the sentence of the Court not requiring the whole proceedings to explain them. Cases in which the record may be referred to, in suits brought against the underwriters.

Unless under peculiar circumstances, no part of the record, other than the sentence, is evidence; and the party wishing to bring himself within the exceptions, must state the purpose for which he means to read other parts of the record, and confine himself to those parts.

It is the duty of the master to put in a claim to property against which proceedings are instituted; and his failing to do so, may possibly affect the claim of the insured, under certain circumstances.

THIS cause, in which a new trial was granted at the last term, now came on. The evidence was the same, with some additional circumstances, strongly pressed upon the jury by the defendants' counsel, to show that the additional cargo was Spanish property, covered by the plaintiff. No evidence was given to prove the materiality to the risk, of the nondisclosure of the purchase of that cargo, supposing it to have been *bona fide*.

The defendants' counsel offered to read the whole of the record of the Vice-Admiralty Court at Jamaica, condemning the vessel and cargo; but the Court refused to let it be read, observing, that the sentence, being free from ambiguity, did not require any aid from other parts of the record, in order to explain the ground upon which it went; and of course, it was all that it was necessary or proper to read. The record might be referred to, for some purposes; such, for instance, as to show that no claim was put in; that the condemnation was probably produced by an untrue and fraudulent claim, or by other mis-

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conduct of the captain, to be collected from his answers to the standing interrogatories, and from the same source to impeach his evidence given in the trial here; and also to show what papers were found on board, as acknowledged by the captain. But unless with these exceptions, or such as rest upon similar principles, the record, other than the sentence, is not evidence; and, to save time, the party wishing to bring himself within any of the exceptions, must state the purpose for which he means to read any other part of the record, and confine himself to that point. The Court referred to former decisions here upon this question, and to the opinion of the Supreme Court, at the last term, in the case of *Hodgson vs. The Marine Insurance Company of Alexandria*.

The defendants produced in evidence the oath taken at the custom-house by Cazenove, in which he states, that the goods mentioned in the entry, which includes the four boxes imported by Cazenove, he had delivered to Marshall, and Marshall swears that he received them from Cazenove; whereas, the form of the oath prescribed by law, is, that the one sold, and the other purchased. This was urged as strong evidence, to show, that no real transfer of this property from De Lastre had been made.

Many inaccuracies were pointed out in the custom-house proceedings, where Cazenove appeared as the importer of these goods, instead of agent to De Lastre; and the invoice of the outward cargo is dated the 4th of October, whereas the sale to the plaintiff is dated the 14th. A witness was examined, to prove that this was a mistake, and that the date of the invoice should have been the 15th. Evidence explanatory of the inaccuracies at the custom-house, was also given. Other circumstances were also relied upon by the defendants, to show that the transfer of these goods, originally belonging to De Lastre, was not real.

It was also objected, that the captain put in no claim at Jamaica; which might have produced the condemnation, and for which the insured ought to be responsible.

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It was also objected, that the condemnation was for illicit trade; and also, that the vessel and cargo were not sufficiently documented; and further, that one of the boxes containing books imported by De Lastre, was not pretended to be sold to the plaintiff, although it was acknowledged that it was not covered as the property of the plaintiff, though put on board by him.

WASHINGTON, Justice, charged the jury. It is certainly the duty of the master, to put in a claim for his owners, and their claim upon the underwriters may possibly, under certain circumstances, be affected by a neglect of the master to do so. But in this case, the letters of the captain to his owners calling for duplicates of the papers, of which the first privateer that brought him to had deprived him, proves that it was his intention to file a claim; and his omission to do so may fairly be attributed to his death, which took place before the sentence.

As to the charge of illicit trade, there is not the slightest evidence of it; the letter of Mr. Lenox, the consul of the United States at Jamaica, stating this, not being to be regarded by the jury. As to the want of proper papers to prove the neutrality of the property, the charge is unsupported, and the contrary is sufficiently established.

The important point is, whether the goods imported by De Lastre, and mentioned in the bill of parcels from Cazenove to Marshall, were *bona fide* sold to the plaintiff? Cazenove swears that he purchased them from De Lastre, and sold them to Marshall, and received payment; and this is corroborated by the bill of parcels, with Cazenove's receipt for the money. In opposition to this, the defendants rely upon circumstantial evidence, which, if sufficiently strong to convince your minds that this was a fraudulent transaction, ought not to have the less weight because it is not positive and direct. The circumstances principally relied upon, are, the kind of goods—not

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such as could be intended for sale, but such as were suited to the condition of a man of fortune and high station; that they are the very goods brought in by him to New-York, and which were exported in the same vessel which was to convey him to Carthage. Secondly. As a proof that Marshall acted as a mere agent, he charged $2\frac{1}{2}$ per cent. commission at the foot of the invoice. Thirdly. The irregularities at the custom-house. Fourthly. Cazenove has produced no bill of parcels, receipt, or other document whatever, showing that he purchased these goods from De Lastre. Lastly, and principally; the oaths taken at the custom-house by Cazenove and Marshall, in which they describe these goods as *delivered* by one, and *received* by the other, contrary to the prescribed form, which should have stated them as *sold* by Cazenove, and *purchased* by Marshall.

It is for you to say, if these circumstances are sufficiently weighty to overpower the positive evidence in the cause. If this was in fact belligerent property, covered by Marshall, the owner of the vessel and cargo, this will avoid all the policies, upon the ground of concealment; because it exposed the whole to the hazard of confiscation, and most certainly to seizure, detention, and expense, affording to the insured an opportunity to throw the whole on the underwriters. If any of the articles put on board by Marshall were the property of De Lastre, and were not covered as belonging to the plaintiff, (which it was contended by the defendants' counsel was the case of the box of books,) this might also be material to the risk, by inducing seizure, a carrying in for examination and adjudication, though finally, a condemnation of more than the belligerent property could not have been justified. As to the materiality of this fact to the risk insured, you are to decide; and the Court has only to inform you, that the concealment of a material fact avoids the policy.

Verdict for defendants.

WEBSTER vs. WARREN.

Action of covenant upon an agreement under seal, by which the plaintiff stipulated to perform, in the Philadelphia and Baltimore theatres, for three years, and not to play or sing at any other theatre, without the license of the defendant; and the defendant agreed to pay the plaintiff so much per week, and to allow him the profits of a benefit and a half each season, provided the plaintiff kept and performed all his covenants, and not otherwise.

The defendant pleaded covenants performed, with leave to give in evidence, every thing which amounts to a legal defence.

The defendant offered evidence to prove that the plaintiff had played at other theatres, without his license; and ill conduct on his part, which had produced riots at the theatre.

This plea, according to its import, and the understanding of the bar, amounts to an agreement that the defendant may give in evidence any thing which he might plead, and which, in point of law, can protect him from the plaintiff's claim.

Where the covenants are dependent, the plaintiff cannot support his action as to them, without showing performance of every affirmative covenant on his part, and in such a case, it is competent to the defendant to prove a breach of such as are negative.

Where the covenants are independent, evidence, under the plea of covenants performed, with leave, &c., cannot be given, which amounts to a bar of the plaintiff's action, or to an offset of damages sustained by a breach of other independent covenants. Such evidence cannot be given in mitigation of damages.

THIS is an action of covenant, upon an agreement under seal, executed by both parties, whereby the plaintiff agrees, for three years, to play and perform upon the Philadelphia and Baltimore theatres, under the management of the defendant, such parts and characters as should be allotted to him by the managers, to attend the rehearsals at the times appointed, and to pay, or permit the manager to retain, such forfeits as he, Webster, may incur, according to a table of forfeits annexed, and

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not to play, or perform, or sing, on any other stage, or in any other place, during the above time, without a license first obtained from the manager. In consideration of all which covenants to be performed by Webster, Warren agrees to allow him, for the first year, eighteen dollars per week, during the seasons, payable weekly by the treasurer; and for the remaining two years, twenty-three dollars and thirty-three cents per week. The agreement then proceeds to state, that if Webster shall keep and perform all and singular the above covenants, on his part, and not otherwise, Warren agrees to allow him annually, one winter, and half of one summer benefit. The parties then mutually bind themselves each to the other, in a certain penalty, to keep their said covenants. The breaches laid in the declaration are, that the defendant, in April 1808, before the expiration of the three years, discharged the plaintiff, although he was always ready, and offered to perform his parts of the agreement, and had refused, from that time, to pay him the sum stipulated per week, and also to allow him the benefits, to which he was afterwards entitled. Plea, covenants performed, with leave to give in evidence every thing which amounts to a legal defence; to which plea issue was taken.

The plaintiff proved his dismission, the probable value of his benefits, to which he claimed to be afterwards entitled, the non-payment of them, and of his weekly allowances.

The defendant then offered evidence to show that the plaintiff had broken his agreement, by playing or singing, without license, at New-York, previous to his discharge; that by his misconduct, either real, or imputed to him by the public, the character of the theatre had been injured, and each night, when the plaintiff appeared, the theatre had, for this reason, exhibited scenes of riot and confusion; and, finally, that the plaintiff had sustained no injury by being turned away, having received at other theatres much more than the defendant was bound to pay him.

This evidence was objected to, and the Court called upon

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the defendant's counsel to begin and show, if they could, that it was proper.

Rawle and J. R. Ingersoll, for the defendant, insisted, that under this plea, and according to the practice of this state, the defendant was at liberty to give in evidence, any matter which might have been specially pleaded, or in mitigation of damages; and that it was not necessary to give notice of the matters intended to be urged in the defence. That these were dependent covenants, or if not so, still, as the defendant could have no remedy for the breaches committed by the plaintiff, he might offer the matter in evidence, to lessen the damages.

C. J. Ingersoll, for the plaintiff, combated all those points, and cited the following cases, 1 Sand. Rep. 320. Cowp. 56: 2 Bac. Ab. 92. Dougl. 684. 1 T. Rep. 638. 1 Esp. Rep. 35. 1 Camp. Nisi Prius, 377. 5 Bos. and Pull. 136. Willis, 157.

By the Court. The greatest difficulty arises from the singularity of the plea, which seems almost peculiar to this state. But, construing it according to its own import, and the understanding of the bar, we conceive it amounts to an agreement, that the defendant may give in evidence any thing which he might plead, or which, in point of law, can protect him against the claim; and, although it would seem just, that the plaintiff should have notice of the matter of the defence, yet, as in similar actions and pleas on policies of insurance, it is not the practice to give such notice, unless called for, we should consider the objection now made on this account, as a surprise on the defendant, which might induce the Court to set aside the verdict, if against the defendant.

With respect to the breach assigned, as to the benefits, it is clear, that the covenants are dependent, and that the plaintiff is not entitled to claim any thing in the way of benefits, without showing performance of every affirmative covenant on his part, and it is competent to the defendant to prove the breach of such of the covenants as are negative.

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But as to the other parts of the agreement, the covenants are mutual and independent, Webster agreeing to do certain things, and not to do others; and Warren, in consideration of such covenants, agreeing to pay him so much per week.

As to those covenants in respect to the weekly pay, the defence set up amounts either to a bar of the plaintiff's action, or to an offset of damages, sustained by a breach of independent covenants. It is impossible that the first can be supported, where the covenants are independent.

If the defendant has been injured by a breach of the covenants on the part of the plaintiff, he may recover damages in an action against him, but he cannot give such breaches in evidence, either by way of bar, of offset, or in mitigation.

Upon this opinion being given, the parties agreed to a compromise, and a juror was withdrawn.

The United States vs. Price, Administrator.

THE UNITED STATES vs. PRICE, ADMINISTRATOR OF O'NEIL.

A bill of exchange was drawn by a public sub-agent, on the general agent of the United States, and payment of the same was at first refused, but it was afterwards made to the defendant, and soon after, it having been discovered that the sub-agent, who drew the bill, was unfaithful, notice was given by the general agent to the defendant, who held the money, as administrator of the payee, not to pay it over, as it was claimed by the United States.

Though a bill drawn for value received, might, *prima facie*, be considered as drawn upon a consideration, yet, when a strong ground is laid to show a want of consideration, the defendant ought to show that value was given for the bill.

ONE Taylor, a deputy military agent of the United States, at New-Orleans, drew two bills of exchange, for fifteen hundred dollars each, as agent, on Mr. Leonard, of Philadelphia, principal agent, in favour of one Elkin, who endorsed the same in blank, and they were brought by O'Neil to Philadelphia, and presented to the drawee for acceptance. The drawee, suspecting something wrong from the heavy drafts of Taylor, refused to accept, until he should receive from the Secretary of War orders to do so. O'Neil expressed great anxiety to get the bills accepted, and offered him, as a premium, to accept, first two and a half per cent., and then one hundred dollars, which were refused with disdain. O'Neil then informed Leonard that he was about to leave town, and should deposit the bills with the defendant, Price, to whom he requested him to pay their amount. Leonard, afterwards receiving orders from the Secretary of War to pay the bills, did so, within the days of usance; but, in a day or two after, hearing that Taylor was dead, and his suspicions of foul play being strengthened, he called upon Price, and requested him to repay the money, offering to redeliver the bills to him. Price declined this, acknowledging

The United States vs. Price, Administrator.

that he still had the money; but apprehending that he might be answerable to O'Neil for the same, resolved to retain it until it should be determined who was entitled to it. O'Neil, dying afterwards died, Price took out letters of administration upon his estate.

It was proved that Taylor was a sot and gambler, and played at the house of Elkins and O'Neil, who were partners in the business of gambling. That Taylor had before drawn bills on Leonard, in their favour, which they sold in the market at a great discount. There were other circumstances proved, tending to throw suspicion over the fairness of this transaction.

WASHINGTON, Justice, then charged the jury, and stated, that although, *prima facie*, a bill drawn for value received, might be considered as drawn for consideration, yet, that when so strong a ground was laid, as is done in this case, to show the want of consideration, and to warrant the belief that these bills were drawn by a profligate public officer, to satisfy gambling debts, to those who were the payee and endorser of the bill, it behoved the defendant to clear the case of these suspicions, and to show that value was given for them. The evidence is certainly very strong in this case, against the fairness of the consideration paid by Elkins as well as by O'Neil. Of all this, however, the jury are the proper judges.

The Jury found for the defendant.

PENNSYLVANIA,

Oliver vs. Parish.

OLIVER vs. PARISH.

The Court are not precluded from obtaining further satisfaction, as to the debt sworn to in an affidavit to hold to bail, because the affidavit is positive; but the necessity to examine the party making the same, *must be presented on the face of the affidavit.*

RULE to show cause of action, and why the defendant should not be discharged on common bail. The plaintiff produced a positive affidavit of the debt, made by Sarmiento, the real plaintiff. The defendant suggested that the promise of the defendant mentioned in the affidavit, was in fact conditional, and prayed that under the rule of the Court, which states that the Court will, in its discretion, interrogate the party making the affidavit, in order to satisfy its conscience as to the cause of action, and quantum of bail, that Sarmiento might be examined.

By the Court. If where the affidavit is positive, as in this case, the defendant, by a suggestion of circumstances to invalidate it, may examine the plaintiff upon interrogatories, there is an end of discretion, and the inquiry must be gone into, in every instance. The meaning of the rule is, that if, *from the face of the affidavit itself*, further satisfaction be deemed necessary, the Court is not precluded from obtaining it, by examining the person who made the affidavit, merely because the debt is positively sworn to. This may be particularly proper, where the affidavit is made by some other person than the plaintiff himself.

Rule discharged.

APRIL TERM, 1810.

Muns vs. Dupont.

MUNS vs. DUPONT DE NEMOURS.

In a case removed by the defendant from the state Court to the Circuit Court, on the ground that the defendant was an alien, the damages laid in the writ exceeded five hundred dollars, and bail to a much larger amount was given, which were held sufficient to give jurisdiction.

It has been frequently determined, that the damages laid in the declaration, give the jurisdiction as to the matter in dispute.

The damages laid in the writ, and in the plaintiff's affidavit, are equally conclusive, as to the amount in controversy, for the purposes of jurisdiction.

THIS was an action brought in the state Court, and sounds altogether in damages. The damages laid in the writ exceeded five hundred dollars, and bail to a larger amount was given there, and had been given here. The state Court having, upon the petition of the defendant, directed the cause to be removed to this Court, the defendant being an alien, the only question was, whether it ought to be received and docketed, the damages being uncertain.

By the Court. It has been frequently determined, that the damages laid in the declaration, gives the jurisdiction as to the matter in dispute. The damages laid in the writ, and established by the affidavit of the plaintiff, on which bail has been taken, is equally conclusive, or else no suit could be removed from a state to a federal Court, where the claim is for damages; since the petition to remove must be at the time of entering an appearance, before the declaration is usually filed.

Action ordered to be docketed.

Bowerbank vs. Payne.

BOWERBANK vs. PAYNE.

The Court refused to enter an *exoneretur* on the bail-piece, on the ground that the defendant was confined in the hospital, as a lunatic.

RULE to show cause why an *exoneretur* should not be entered on the bail-piece, the defendant being confined in the hospital, as a lunatic. The affidavit of the bail, on which the rule was granted, stated, that since the suit was brought, the defendant had become deranged in his mind, and was now in the hospital.

In support of the rule, Mr. Hare cited 12 T. Rep. 126; and though he admitted, that in a case like the present, the English cases were flatly against him, still, as the defendant, from his situation, could not relieve himself from confinement by availing himself of the insolvent law of the United States, humanity forbade his being thrown into jail by his bail, which his liability must compel him to do, if he cannot be relieved from his undertaking.

By the Court. If we were satisfied that the derangement of the defendant were permanent, there is no legal ground for relieving the bail, since he is not prevented by any law from delivering him up; and humanity, if it were a ground on which the Court could interfere, is not concerned in the question, whether the defendant shall be confined in a jail, or in the hospital. In either case, he will be taken care of. But what we deem conclusive, is, that there is no proof that the derangement of the defendant is more than temporary, and in such a case, nothing could justify a release of the defendant from this undertaking.

Rule discharged.

Hitner vs. Suckley.

HITNER vs. SUCKLEY.

Rule to show cause why an injunction to stay waste should not be granted, and why service of the subpoena upon the attorney of the defendant, in a suit depending against the defendant for slandering his title to the land mentioned in the bill, should not be considered as a service on Suckley. If a judgment at law be obtained, the service of a subpoena on the attorney of the plaintiff, he being absent from the state, will be deemed good, where the subject in controversy is the same with the matter in the suit for which the judgment was rendered.

RULE to show cause why an injunction to stay waste should not be granted, and why service of the subpoena, upon the attorney of the defendant, in a suit depending against the plaintiff, for slandering his title to the lands in the bill mentioned, should not be considered as a service on Suckley. The case was, that one Broom, being indebted to Hitner, executed a mortgage to him for securing the same, on a certain tract of land the subject of this injunction. Suckley, being a creditor of Broom, obtained a judgment against him; and the same land was taken in execution, sold by the Marshal, and purchased by Suckley. The bill charges, that the defendant has committed, and threatens to continue committing, waste on this land, which will be rendered insufficient to discharge the debt due to the complainant. The defendant in Equity, is plaintiff at law, in the action against the complainant, for slandering the defendant's title to this land, and the question was, whether service of the subpoena on the defendant's attorney in that cause, ought to be considered as a service on the defendant? The complainant's counsel cited 1 P. W. 523. 1 Harr. C. Prac. 208. 162.

Hitner *vs.* Suckley.

By the Court. If a judgment at law be obtained by one person against another, and an injunction be applied for, the Court will consider a service of the subpoena upon the attorney of the plaintiff at law, to be sufficient, if his client live out of the state. But the action at law by the defendant against the complainant, for slandering his title, is totally unconnected with the subject of controversy presented by this bill; and the Court cannot consider the defendant's attorney in that action, as representing him in this case.

The motion for the injunction was withdrawn, on the counsel for the defendant promising to advise his client not to commit waste.

Medford vs. Dorsey.

MEDFORD vs. DORSEY,

Judgment on an award that the defendant pay so much on receiving from the plaintiff an indemnity against certain claims. The plaintiff afterwards refused to give the indemnity; and on the defendant paying more claims, against which he was to be indemnified, than the amount of the judgment, the Court ordered satisfaction to be entered on the judgment.

THE defendant, since the decision, (*ante*, page 433,) having paid to one of the persons who had sued him, and against whom the plaintiff, by the report of the referees, was to indemnify him, so much of the sum awarded, as with the sum before paid to Holt, and a small sum now paid into Court, amounts to eighteen hundred and fifty dollars; moved the Court to enter satisfaction of the decree, which the Court directed,

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, ADJOURNED SESSIONS, JANUARY, 1811.

REPORT { Hon. BUSHROD WASHINGTON, Associate Justice of the
Supreme Court.
Hon. RICHARD PETERS, District Judge.

CARSON & SMITH vs. THE MARINE INSURANCE COMPANY.

In case of a total loss, the insurer loses precisely as much as the property insured was worth at the time and place of shipping it, the expenses of lading included. What the property cost the assured, is not the rule of value, in adjusting the loss; but what it was worth, or would sell for, when shipped.

The invoice price is not a proper test of value.

In a valued policy, both the assurers and the assured agree; and therefore the assured is excused from proving, at the trial, the amount of loss.

The rule for fixing the value of a vessel which has been lost, and which has been insured in an open policy, is to take the sum she was worth at the time of her departure, including certain expenses.

THIS was an agreed case, in which the only question submitted to the Court was, whether, in case of a total loss of goods insured in an open policy, the invoice price, agreeing with the first cost, shall be taken as fixing the value; or, the current market price of similar goods at the time and place of shipping them; the latter being about 25 per cent. lower than the former.

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Chancery, for the plaintiffs, relied upon the following cases: 3 Marsh. 680; Park. 104, 400; 3 Caines, 43, 47. 1 Johns. N. Y. Cases, 120.

Bisney and Hopkinson relied on the case of *Swell vs. The Delaware Insurance Company*, 4 Dall. 430; considering, that there is no difference between an insurance on ship and cargo, in this respect; and they argued upon the unreasonableness of the opposite doctrine.

WASHINGTON, Justice, delivered the opinion of the Court. It being admitted that there is no direct authority or custom in relation to a case precisely like the present, it must be decided upon an attentive consideration of the nature of the contract of insurance. What is it? An agreement by the insurer, in consideration of a certain reward, to stand in the shoes of the insured, and to indemnify him for any loss which may happen to the thing insured, *from certain perils enumerated in the policy*. This is effected by paying him, in money, the value of the property at risk, with the expenses incurred in putting it on board, duties, &c. Suppose the property to be destroyed within an hour after the risk has commenced—(and the time makes no difference in the principle)—what does the owner lose? Precisely as much as it was worth, or would have commanded in market at the time and place it was shipped, including expenses, and no more. If the property cost him less than it was worth when shipped, he loses as well the first cost as the increased value, for which he is entitled to claim an indemnity from the insurer. If it cost him more, he loses the difference between the first cost and the diminished value when the property was shipped; but for this difference, he can have no claim for indemnity under the contract, because the loss did not result from any of the perils against which an indemnity was stipulated, but from an unprofitable speculation, anterior to, and unconnected with the contract. Those who have contended for the value at the first port of discharge, have had

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much more reason on their side than the law of insurance, as understood in most countries, has sanctioned; for they have fairly argued, that the owner has lost, *by a peril insured against*, all that would have been gained by a successful termination of the voyage beyond the value of the property at the port where it was shipped. But this test of value is rejected, and perhaps rightly so, for the reasons assigned in the books. But it is impossible that the first cost can ever furnish a just rule of indemnity, where it exceeds or falls short of the actual value of the property when it is put at risk.

The invoice price, which was contended for on behalf of the plaintiffs, is liable to all the objections which exist against the prime cost—and to an additional one, which, in the opinion of the Court, cannot be surmounted. It furnishes no rule of indemnity, in any case where it exceeds, or is less than the market value of the article; if the former, the insured is more than indemnified, by receiving more than it was worth; if the latter, which it is presumed will seldom, if ever, happen, his indemnity would be in part only. But the strong ground of objection to this rule for appreciating the value of the property at risk, is, that it substantially destroys all distinction between valued and open policies, and this too in the face of one of the best established rules of evidence. It makes a private document, created by one party to the contract, evidence against the other, as to a fact which it is essential for the former to prove in the ordinary way. In the case of a valued policy, the insured is relieved from the necessity of proving the amount of his loss, because *both parties have agreed* that the property at risk was worth so much. But, to bind the insurer by the arbitrary value fixed in the invoice, is to subject him to *ex parte* evidence, furnished by his opponent in the cause, without his agreement, and even without his knowledge of its contents when the contract was entered into. And as it rarely happens, if ever, that an invoice does not accompany the cargo, it would follow, that all policies would in fact be valued; with this difference only,

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that what has hitherto been understood as valued policies, means nothing more than such as are valued by both parties, whereas open policies would be valued by one of the parties only.

If neither the prime cost, nor the invoice price, can furnish a correct rule for estimating the value of the plaintiffs' indemnity, will both together answer the purpose? If they differ, neither can be admitted, if the preceding course of reasoning be right. If they agree, then the contention for a choice is merely a dispute about terms. But if either or both vary from the real value of the property insured, and consequently furnish no just rule of indemnity, then it is impossible that their agreement can furnish any.

Marshall has strangely embarrassed this subject, by using as anonymous, terms which are substantially different. "In England," he observes, "the loss is estimated according to the prime cost—that is, the invoice price." If they should happen to be the same, or must always be so, it was unnecessary to multiply words, in order to inform us that either might be taken. If they differ, which they frequently may do, then the two expressions cannot mean the same thing; and he has omitted to state, in such a case, which is to govern. He is much more intelligible, when he states, that "the first price of a thing does not always afford a sure criterion to ascertain its true value, because it might have been bought very dear, or very cheap. The circumstances of time and place cause a continual variation in the price of things." Roccus is explicit upon the subject: "Where the contract," he observes, "is simply to pay the value of the goods in case of loss, the time of entering into the obligation is to be considered; and according to the then existing value, should the estimate be made. Thus," he adds, "the damage sustained by the assured in case of loss, is not considered a source of profit." The French rule seems to be the same; though in a valued policy, the insured is allowed to add the invoice value between the prime cost

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and the market price. As to the rule of ascertaining the value of a ship, it is agreed on all hands, that the sum she was worth at the time of her departure, including certain expenses, is to govern; and the Court can perceive no reason for establishing this rule, which does not apply to the case of goods.

Upon the whole, it is the decided opinion of the Court, that judgment in this case must be rendered according to the market price of the property insured, at the time and place of exportation.

Assignees of Simonton vs. Boucher et al.

ASSIGNEES OF SIMONTON vs. BOUCHER, SMITH, AND WOOD.

S. and B. entered into a partnership, and it was agreed that the separate debts of B. should be assumed by the firm; and a bond was given by B. with sureties, to indemnify S. against loss by the said assumption.

In an action against the sureties by S., after the dissolution, an award given in favour of S., in a reference entered into between S. and B.; the award having been founded on the acknowledgments of B., and not confined to the assumed debts, cannot be given in evidence.

Entries made by S. or B. in the partnership books, after the dissolution, cannot be given in evidence against the sureties, but evidence of the confessions of B. may be given.

Entries made after the dissolution, may be given in evidence against the party who made them.

UPON the formation of a partnership between Simonton & Boucher, in 1801, Simonton agreed that the separate debts of Boucher, then due by him, should be assumed and paid by the house of Simonton & Boucher; and for securing Simonton for such payments, a bond was executed by the defendants, in which Boucher was bound for the whole of such payments, and Smith and Wood, as his sureties, for one-half. After the dissolution of the partnership, Simonton & Boucher bound themselves to submit their accounts to arbitration, and an award was made, finding a balance due from Boucher to Simonton, of upwards of six thousand dollars. This award is founded on the acknowledgments of Boucher, and a view of the partnership books, but appears not to be confined altogether to the assumed debts, and is only made upon part of the accounts. This action is brought on the bond given by Boucher, Smith, and Wood. Smith and Wood were not parties to the submission, and did not attend the referees.

The plaintiff offered the award in evidence, and also the ac-

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counts annexed to it, and evidence of the confessions of Boucher, which were objected to.

By the Court. The award cannot be read, either as *prima facie*, or as conclusive evidence in this action. But evidence of the confessions of Boucher may be given.

The Court also decided that entries made by Simonton or Boucher, made in the partnership books after the dissolution, might be given in evidence against the party who made them, but not otherwise.

Lessee of Allen vs. Lyons.

LESSEE OF ALLEN vs. LYONS.

In an ejectment against any other person than the proprietary, or one claiming under him, it is not necessary to prove the title out of the proprietaries of Pennsylvania, if a right of entry is proved.

The Orphans' Court, established by the laws of Pennsylvania, has a general jurisdiction, as to intestates' estates, and to direct a sale of real property for payment of debts; and it is not competent for this Court to examine the order of that Court, whilst it remains in force.

The jury, after forty-eight years since the order of the Orphans' Court, and a conveyance under it, without any pretence of an opposing title in all that time, may presume one dead, intestate, and without issue, alleged to have been so at the time of the proceedings of the Court.

When, in a will, a devise was of a house and lot in Fourth street, Philadelphia, and the testator had no property in Fourth street, but he had a house and lot in Third street, it is a latent ambiguity, and may be explained by parol testimony.

THE plaintiff, in tracing his title, began with a deed from one R. to William Carter, dated April 1733, granting a rent charge out of this ground, being a lot in Philadelphia; a deed from R. to Benjamin Clark, of the fee simple of the lot, charged with the rent, in 1738: the will of Clark, devising this lot to his wife for life, and to his seven children; deed from the widow and five children to Thomas Campbell, of five-sevenths of the lot: an order of the Orphans' Court, authorizing the administrator of William Clark, (the son of Benjamin Clark,) to sell the remaining two-sevenths, being his own one-seventh, and the part of a deceased sister, who, it was alleged, but not proved, died without issue, by which William Clark became her heir, dated in 1762: the return and report of the sale, confirmed by that Court, and a deed founded thereon in 1762, for the other two-sevenths to Thomas Campbell: the will of

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Thomas Campbell, by which he devised his lot on Third street, in the occupation of R. H., to his daughter, the lessor of the plaintiff. This property lies on Fourth street, and it appeared from the tax-books, and accounts of the executor of Campbell, that the lot in question, about the time of the making of Thomas Campbell's will, was in the occupation of R. H., and that the rents were received for Sarah, the lessor of the plaintiff, down to 1771. In 1781, this property was confiscated, as belonging to Mr. Allen, the husband of the lessor of the plaintiff, and he is now dead.

The defendant's counsel objected, first; that the plaintiff should show the title to be out of the proprietaries. Secondly; that it did not appear that the Orphans' Court were authorized to direct a sale of William Clark's share. Thirdly; that it did not appear that he was heir to his sister of her one-seventh. Fourthly; the devise is of a lot on Third street, and this lies on Fourth street; and parol evidence is inadmissible to explain it.

WASHINGTON, Justice, charged the jury. The case of *Hykon vs. Brown* (a) is express, that in an ejectment against other than the proprietor, or one claiming under him, it is not necessary to show the title out of him, if a right of entry is proved. Secondly; the Orphans' Court has a general jurisdiction, as to intestates' estates, and to direct a sale for payment of debts, which it appears was necessary in this case, and it is not competent to this Court to examine the order of that Court, which remains in full force. Thirdly; whether William Clark was the heir to Elizabeth, and became entitled to her one-seventh, is a fact proper for the jury. It is forty-eight years since this order was made by the Court, confirmed by them, and the conveyance to Thomas Campbell, in all which time, no pretence of title, adverse to William Clark's, and

(a) *Ante*, page 165.

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those claiming under him, has been set up; and in this case, the plaintiff and defendant both claim under his title. In such a case, the jury may presume that Elizabeth Clark died intestate, and without issue, by which William became entitled to her one-seventh. Fourthly; the ambiguity in the case of Thomas Campbell's will is latent, and may be explained by parol evidence. It does not appear that he had any lot on Third street, but he had one on Fourth street, and that was in the occupation of R. H. If the jury are satisfied that this was the lot intended, and are also satisfied upon the third point, their verdict ought to be for the plaintiff.

Verdict for the plaintiff.

The United States vs. Mitchell.

THE UNITED STATES vs. MITCHELL.

Although a certificate of a survey of a vessel is not evidence of the facts stated in it, yet, if the surveyors, in a deposition regularly taken, refer to the certificate, as containing all they know, it is evidence.

The certificate of the American consul at a foreign port, under his seal of office, that the ship's papers were lodged with him, agreeably to the requisitions of the embargo law, is good evidence of that fact, but not of other facts stated in it.

If a log-book be offered in evidence, it should be proved to be the book kept on the voyage. It is not sufficient to prove the hand-writing of the mate, as to some of the entries in it.

DEBT on an embargo bond. The defence was, that the vessel, by stress of weather, was forced into St. Thomas's, where she was so disabled that she could not, without repairs, have returned to the United States; and that the government prohibited the carrying away the cargo. To prove the condition of the vessel at St. Thomas's, the defendant read the depositions of two of the surveyors, who were appointed to view her, and who refer to the survey, and declare that it contains a true statement of her condition: that it contains all they knew then, or now know on the subject." The reading of the survey was objected to.

By the Court. In *Watson & Hudson vs. The Insurance Company of North America*, (a) we determined that a survey is not evidence of the facts stated in it. But in this case, the witnesses have incorporated it into, and made it part of their depositions, and of course attest the verity of the facts stated in it, as fully as if they had set forth the same facts in their deposition. Of course it may be read.

(a) *Ante*, 152. *Post*, 469.

The certificate of the consul at St. Thomas's, that the ship's papers were lodged with him, agreeably to the Act of Congress, under his seal of office, was admitted as evidence, and other parts of it, as to other facts, struck out.

The defendant offered a book, as the log-book of the vessel, and insisted, that as the District Attorney had given him notice to produce the log-book, this made it evidence. To identify it, the only evidence was by a sailor belonging to the vessel, who deposed as to the hand-writing of the mate, in many parts, and that he saw him marking the words "Log-book of the Lydia," on the cover of the book, on the voyage.

By the Court. The calling for a paper does not make it evidence, unless the party calling chooses to read it, in which case he admits it. But in this case, the call was for the log-book, and no evidence is given that this is the log-book kept on the voyage, but may have been afterwards made up by the mate, to suit the purpose of this cause. The cover does not identify it, as the same words might have been written on any piece of canvass, and put on this book.

The charge merely stated the point for the jury to decide, viz. that the defendants were prevented, from perils of the sea, or other unavoidable accident, from relanding the cargo in the United States. To excuse themselves for going to St. Thomas's, they should prove, that the injured state of the vessel, and adverse winds, prevented them from putting into some port of the United States, and compelled them to go to St. Thomas's; and that, when there, they were prevented by the government from returning, with the cargo, to the United States.

Watson et al. vs. The Insurance Company of North America.

WATSON & HUDSON vs. THE INSURANCE COMPANY OF NORTH AMERICA.

If the certificate of the survey of a vessel be read for the purpose of proving that a survey and condemnation of the vessel had taken place, and to prove no other fact stated in it, the party who, for this purpose only, gave it in evidence, will not be thereby prevented from impeaching the credit of the surveyors, whose depositions have been read.

It is sufficient, on a question of seaworthiness, if the vessel was fit to perform the voyage insured, as to *ordinary perils*—the underwriters are bound as to extraordinary perils.

If the insured lay a rational ground for the disability of the vessel, by proving severe gales during the voyage, and seaworthiness on a preceding voyage, the burthen of the proof of want of seaworthiness lies on the insurer.

After, when a disability happens from stress of weather, without any sufficient cause.

THIS case was again tried, (see *ante*, p. 152,) and turned upon the question of seaworthiness. Upon the opening, the plaintiffs' counsel read the survey and condemnation at Gibraltar, after stating to the jury that he did so merely to show that a survey and condemnation had taken place, but not as evidence of any fact stated in it. The defendants, since the last trial, obtained and gave in evidence the deposition of one of the surveyors, which stated the case in respect to the unsoundness of the vessel at Gibraltar, very unfavourably to the plaintiffs. To meet this evidence, the plaintiffs offered the deposition of the captain, to contradict the statements of the surveyor, and to impeach his credit. This was objected to, on the ground, that the plaintiffs, having read the report of this very surveyor, had made it their evidence, which they could not afterwards impeach.

Watson et al. vs. The Insurance Company of North America.

By the Court. The plaintiffs have not read the survey, as evidence of any fact; and in their opening, disclaimed all intention of considering the surveyor as a witness for them of a single fact, but the contrary. The principle, therefore, which is opposed to the evidence now offered, does not apply.

In the charge, it was stated to the jury, that the question for their decision was, whether this vessel, at the time when the risk commenced, was sufficiently tight, staunch, strong, and well found, to perform the voyage insured, from Cadiz to Antwerp, and to encounter the ordinary perils of that voyage; the underwriters taking upon themselves the risk of extraordinary perils. In considering the evidence of seaworthiness, where a rational ground is laid, as in this case, for the disability of the vessel to perform the voyage, by proof of severe gales to which she was exposed on the voyage; and more especially where, as in this case, the former condition of the vessel, for the two preceding years, is proved to be that of a sound and seaworthy vessel; the burthen of the proof is thrown upon the underwriters, to prove satisfactorily to the jury, that she was not seaworthy, and sufficiently strong to perform the voyage—otherwise, where a disability happens, without any sufficient cause, from stress of weather. With these observations, the question was left to the jury.

2. The Court stated to the jury, that they were not to regard the survey as proving any of the facts stated in it; and directed them, at the request of the parties, that if they thought the vessel seaworthy, to find for the plaintiffs, with the value of the vessel, subject to the opinion of the Court on a point reserved.
Verdict for plaintiffs, value 18,000 dollars, subject, &c.

Jordan vs. Wilkins.

JORDAN vs. WILKINS.

The Court directed a *nonsuit* to be entered, because the evidence varied from the case stated in the declaration; the latter stating the goods as belonging to the plaintiff, of which the defendant, as bailiff, was to make profit for him; and charging the defendant as receiver, by the hands of A, B, C, being the money of the plaintiff; and the evidence proved that the money received was that of himself and his partners, and was received on joint account.

If one party gives notice to another to produce certain papers at the trial, he has no right to inspect them, unless he will consent that they shall be used in evidence.

THIS was an action of account, brought by the plaintiff; and the declaration stated, that the defendant was bailiff of the plaintiff, and had the care and management of divers goods of the plaintiff, viz, flour, &c. of the value of 20,000 dollars, to merchandise and make profit of for the plaintiff, and to render a reasonable account thereof to the said plaintiff, when he should be required; and that the defendant was also receiver of the money of the plaintiff, from such a time, to such a time, [stating it;] and received of the money of the plaintiff, by the hands of certain persons, [whose names are stated,] either 30,000 dollars, to render an account thereof when required; yet, though often required, the defendant had not rendered an account to the plaintiff, but had refused, &c.

The case upon the evidence was, that the plaintiff, together with the defendant, Charles Wilkins, and John A. Syles, entered into a mercantile partnership in 1808, which was dissolved in September 1804, upon the death of Syles. And the subject of this dispute was, a number of shipments of cotton, made to England, on joint account, the proceeds of which, it was contended, had been received by the defendant. But no evidence

was given of any sum having been received by the defendant, by the hands of any one of the persons mentioned in the declaration.

The defendant moved for a nonsuit, upon the following grounds: 1st. That the evidence should prove the receipt of money by the hands of the persons mentioned in the declaration; and the declaration should state the names of the persons from whom each sum was received, and none other can be recovered but such as are stated and proved.

2d. That though one joint merchant, may bring this action against another, yet the declaration must state that the money was received on joint account, in which case he would be liable only for the balance. But a receiver is not, and a bailiff is chargeable for the profits made, or which might have been made. Cases cited for defendant, 1 Vin. 140. 143. 146. Co. Litt. 172. 1 Mod. Ent. 47, 48, 49. 1 Ball. 339. Plead. Assist. 35, 36.

For the plaintiff, it was answered, that the Stat. 4 & 5 Anne, c. 27, which is in force in this state, allows one joint tenant, or tenant in common, to sue the other as bailiff; and therefore, it is not necessary to state that the receipt was on joint account, but that it was received as bailiff. 7 Co. Inst. 199.

WASHINGTON, Justice, delivered the opinion of the Court. The objection to the recovery is, that the declaration charges the defendant as bailiff of certain goods belonging to the plaintiff, to make profit of for the plaintiff; and as receiver of certain sums, by the hands of A, B, and C, being the money of the plaintiff, to whom he will render an account; and has given in evidence sums of money received by the hands, not of the persons mentioned in the declaration, but of a person not named there; and these sums, so received, not the money of the plaintiff, but the money of the partners, and received on joint account. The allegata and probata, therefore, are totally at variance with each other; and the defendant's only remedy is by

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moving for a nonsuit. The declaration states a case at common law; and a case of one tenant in common suing another is proved. If the plaintiff meant to proceed upon the statute, he should have stated his case truly, and that the money was received on joint account, by the hands of the person who really received it. This appears by the case from 1 Dall. 329, where it was decided, that if the proof established the receipt from one of the persons named in the declaration, it would be sufficient. But in this case, no proof has been given going even as far as that, and in that case the receipt was stated to be on joint account. Besides, the Court, in that case, gave the most liberal construction to the statute, in consequence of the want of chancery jurisdiction in the state. This Court has chancery jurisdiction. The plaintiff, therefore, must be called.

Nonsuit.

Ingersoll, Chauncey, and Dallas, for plaintiff.

Hare, Hopkinson, and Tilghman, for defendant.

NOTE.—The defendant produced certain papers, which the plaintiff had given notice would be required at the trial; but gained the opinion of the Court, if he was obliged to show them to the plaintiff, until he declared his intention to read them in evidence.

By the Court. The plaintiff has no right to see the contents of these papers, but on this condition.

JOSHUA FREEMAN vs. PEROT ET AL.

The defendants accepted a bill of exchange, for the honour of the first endorser, the bill being under protest, agreed to pay any person authorized to receive the money, and to give a discharge; this acceptance did not bind the defendants to pay, without the holder putting his name on the bill, or giving, as required, an indemnity to the defendants.

THIS was an action upon a bill of exchange, drawn by G. on the defendants, at sixty days, in favour of Joseph and Samuel Darrell, which came by endorsement to the plaintiff. The bill was presented in due time for acceptance, and was negged; and when at maturity, the defendants accepted it for a part of the sum, and accordingly it was protested. The defendants then accepted, for the balance, for the honour of the Darrells, the endorsers, and to pay to any person authorized to receive the money, and to give a discharge. It was proved that the plaintiff, before the presentation of the bill, left Philadelphia, but gave to Mr. Worth an order on the defendants to pay him the amount of the bill, whose receipt, the order stated, would be a full discharge. The defendants, upon the production of this order, refused to pay, without an endorsement of the plaintiff's name on the bill; but agreed to dispense with that, upon receiving a bond of indemnity, which Worth refused to give.

Rawle, for the defendants, objected, that, without such endorsement, the defendants were not bound to pay; that the protest was not regular, as it stated that it was made at the request of Mr. Worth, who does not appear, on the face of the bill; that he authorized to make it; and of course, the drawer and endorser might, on that ground, resist the claim of the defendants, if they had paid. He objected, also, that there was no protest for non-acceptance. Cases cited, 3 T. R. 261. Bea. Lex Mer. 400-406. Gilbey, 110. 1 Esp. 112. 3 Dall. 144.

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Dallas, for the plaintiff, cited Chitty, 24, 25, 26. Kyd, 99. Marcus, 71.

WASHINGTON, Justice, charged the jury. Before the defendants could be compelled to pay this bill, the plaintiff's agent should have shown himself authorized to place him in a situation to maintain all the rights to which he was entitled. This bill was accepted only in part, and was protested for the residue. The acceptance, *supra* protest, was for the honour of the payee; and although proof of payment might possibly be sufficient in an action against the person for whose honour the bill was partly accepted, upon a count for money paid to his use, yet, as the defendants would have a right to sue all the endorsers above them, for whose honour it was accepted, as well as the drawer, such proof would not be sufficient, in an action against the drawer or such endorsers, if there had been any. As to them, at least, he must sue as endorser. But in this case, the plaintiff was the last endorser, and he has neither endorsed it in blank, nor to his agent. It was contended by the plaintiff, that the endorser who pays to a subsequent endorsee, may sue the drawer, or his endorser, upon proving payment. This may be so; but in that case, the endorser may strike out all the subsequent endorsements, and appear as the last endorser on the bill. In this case, the defendants could not have so appeared, without an endorsement by Freeman; and his name is not on the bill.

It was further insisted, that Worth had an implied power, from the order, to make the endorsement. This may be questioned, but need not be decided; because, if he had, he ought to have offered to make it, when it was demanded by the defendants, and the want of it made the ground of their refusal to pay. The verdict, therefore, must be for the defendants.

Plaintiff suffered a nonsuit.

Dallas, for the plaintiff; Rawley for the defendants.

Lessee of Penna vs. Ingraham.

LESSEE OF PENNA vs. INGRAHAM.

Depositions taken *de bene esse*, cannot be read in evidence, unless the party who offers them, shows that the witnesses were subpoenaed, and cannot attend.

IN this case, the defendant offered in evidence, depositions taken before a Judge of the Common Pleas, which were objected to, because taken *de bene esse*; and it does not appear that the witnesses were subpoenaed, and could not attend.

By the Court. The objection is well taken, and the deposition cannot be read.

The plaintiff not having traced a title to the lessors of the plaintiff, the Court directed a nonsuit; but the parties agreed to withdraw a juror, and to continue.

Tilghman and Wallace, for the plaintiff.

Lewis, for the defendant.

Taylor vs. Gardner.

TAYLOR vs. GARDNER, GARNISHEE OF WILLIAM LEES.

On the 14th of September 1807, a foreign attachment was laid on the property of L., in the hands of the defendant. On the 19th of September, the defendant received goods belonging to L., who, at that time, was under acceptances of bills endorsed by L., and which, on their protest for nonpayment by L., the defendant paid. The attachment entitled the plaintiff to the proceeds of the goods in the hands of the defendant, notwithstanding his liability for, and subsequent payment of the bills endorsed by him.

THIS was a *scire facias* against the garnishee, upon an attachment and judgment against Lees. The question of law arose upon the following facts: The attachment was laid on the 14th of September 1807. In answer to the interrogatories put to the defendant, under the Act of Assembly, he stated, that on the 19th of September 1807, he received fifty crates of earthenware, belonging to William Lees, which netted nine hundred dollars; but that William Lees was under acceptances of certain bills endorsed by the defendant, which the defendant had been obliged to pay, the bills having been protested for nonpayment. These bills were protested in August, and were taken up and paid by the defendant, in October and November 1807.

WASHINGTON, Justice, charged the jury. This is a hard case upon the defendant, who, at the time this attachment was levied, was liable to pay these bills, as endorser, to a much greater amount than the value of the funds of Lees in his hands, and if he had then paid them, he most undoubtedly would not have had in his hands any effects of Lees, as he could not have been liable for more than the balance of account between him and Lees. But until he paid them, he was not a

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creditor of Lees; and of course, the attachment bound the effects of Lees in his hands, at the time it was laid, which could not be affected by subsequent credits, to which he might be entitled. The law of this state is too strong to be resisted. It not only declares, that the goods and effects of the absent debtor, in the hands of the garnishee, shall be bound by the attachment, but that the defendant, to the *scire facias*, shall plead that he had no goods and effects of the debtor in his hands, when the attachment was levied, *nor at any time since, on which the plaintiff is to take issue*, and the jury are to find the fact put in issue, one way or the other. Now, until these bills were paid by the defendant, he had no claim against Lees; and on the 19th of September, he had goods of Lees in his hands, which must decide the issue in favour of the plaintiff. The case must be decided precisely in the same manner as if this cause had come on before those bills were paid by the defendant. Your verdict, therefore, must be for the plaintiff, to the amount of the effects acknowledged by the defendant to have been in his hands, independent of those bills.

Verdict for the plaintiff.

Levy, for the plaintiff.

Hopkinson, for the defendant.

Pollock vs. Pratt et al., Assignees of Baker.

POLLOCK vs. PRATT AND HARVEY, ASSIGNEES OF BAKER.

P. paid a sum of money to the United States, as surety of S. in a bond for duties. S. became insolvent, and assigned his effects to Baker, who received four thousand dollars under the assignment, mingled the same with his own funds, and afterwards became bankrupt, and the defendants were appointed his assignees, but no effects, known to be part of the estate of S., came into their hands. The plaintiff claimed to have a preference and priority over the general creditors of Baker.

Although the United States might, under the sixty-fifth section of the law to regulate the collection of duties, be entitled to claim of the defendants, to the amount which came into the hands of B., as the assignee of S., the provisions of the law do not extend to the surety who has paid the bond, the same rights and privileges.

THIS was an action to recover the balance of a large sum of money, paid by the plaintiff to the United States, as surety for Mr. Swanwick, in a custom-house bond; Swanwick having become insolvent, and having assigned all his estate to Baker & Shoemaker, in trust, first to discharge his custom-house bonds, to indemnify his sureties, and then in trust for his other creditors. The plaintiff received sundry payments from the assignees of Swanwick, and this suit was brought for two thousand one hundred and twenty-two dollars and thirty-six cents, the balance. Baker received from the estate of Swanwick, upwards of four thousand dollars, which he mixed with his own money, and afterwards became a bankrupt, and the defendants are his assignees. No part of the estate of Swanwick has ever come to the hands of the defendants.

The jury found a verdict for the plaintiff, subject to the opinion of the Court upon this point, whether the plaintiff is entitled to recover, and to have a preference and priority over the general creditors of Baker?

 Fallock vs. Pratt et al., Assignees of Baker

WASHINGTON, Justice, delivered the opinion of the Court. The question submitted to the Court, depends upon the sixty-fifth section of the law to regulate the collection of duties, &c., vol. IV. of the Acts of Congress, page 386. By this it is directed, that if the obligor in a custom-house bond, become insolvent, or if his estate, in the hands of the executors, administrators, or assignees, shall be insufficient to pay all the debts of the deceased, the debt due to the United States, on such bond, shall be first satisfied, and if any executor, administrator, or assignee, or other person, shall pay any debt due by the person or estate from [it should be *for*,] whom, or for which they are acting, before the debts due to the United States, from such person or estate, being first satisfied, he shall be answerable, in his own person and estate, for the debts due to the United States, and actions at law may be brought against him for the recovery of the said debts. And if the principal in any such bond shall be insolvent, or being dead, his estate and effects, which shall come to the hands of his executors, administrators, or assignees, shall be insufficient for the payment of his debts, and the surety, in either case, shall pay to the United States the money due on such bond, the surety shall have the like advantage, priority, or preference, for the recovery and receipt of the said moneys out of the estate and effects of such insolvent or deceased principal, as are reserved and secured to the United States, and may maintain a suit upon the said bond, in law or equity, in his own name, for the recovery of all moneys paid thereon. The law then proceeds to state, that cases of insolvency shall be such in which a debtor shall have made a voluntary assignment for the benefit of his creditors, his estate not being sufficient to pay his debts, or where the estate of an absconding, concealed, or absent debtor is attached, as well as to cases of legal bankruptcy.

The provisions of this law, as they concern the interest and security of the United States, are so general as to create a liability to pay a custom-house bond, not only in the original

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debtors, and in those who legally represent them, but in any person who may have charge of the estate and effects of the original debtor, or any other; who, in legal contemplation, has made himself debtor to the United States for the whole, or any part of the original debt, and this liability is accompanied by the additional advantage of a preference over the other creditors of the person so chargeable. To exemplify this observation; the United States possessed a right of recovery and preference, not only against Swanwick and Pollock, and against the assignees of Swanwick, but against the assignees of Baker, because, by his receipt of four thousand dollars of the estate of Swanwick, he became a debtor to the United States, and he is a person, in the words of the law, for whom, and his estate is one, for which his assignees are acting, and in that capacity they are forbid to pay the other creditors of Baker, before the debt due to the United States is paid, under penalty of being themselves personally answerable to the United States.

But in regard to the advantages reserved to the surety in the custom-house bond, the provisions are confined to the estate and effects of his insolvent or deceased *principal*, so that although, without the aid of this law, such surety may, upon common law principles, have his remedy against the representative of him, who, by receiving the effects of Swanwick, became liable to pay the creditors of Swanwick, yet, under this law, he cannot claim against him the same advantage, priority, or preference, to which the United States was entitled; because no part of the estate of Swanwick ever came to his hands. The money paid to Baker by his co-assignee, was mingled with his own, probably used by him, and cannot, or has not been specifically traced into the hands of the defendants.

Goodwin vs. The United States.

GOODWIN, PLAINTIFF IN ERROR, vs. THE UNITED STATES.

Action of debt, in the District Court, for the value of goods stated to have been fraudulently entered. The declaration states the goods to have been imported into Philadelphia, of which entry was made, and that the goods were not invoiced according to their actual cost at Liverpool, the place of their exportation, with a design to avoid the payment of the duties, of part of them; that the goods were of greater value than the amount of the invoice; and that the defendant was the person making the entry, contrary to the form of the Act of Congress, &c.

The offence, under the Act of Congress, consists in the making of an entry upon an invoice, below the actual cost of the goods, with design to evade the duties. No matter how fraudulent the invoice may be, still, if the entry is made according to the actual cost, the person making it is guilty of no offence. The law requires that the goods shall be entered at the market value at the place of exportation, deducting charges.

The declaration imputes to the consignee the offence of the exporter, and makes him liable for it, although the fraudulent intention is imputed by the declaration to the person making the invoice, and not to him who made the entry, and is prosecuted for the fraud.

THIS was a writ of error from the judgment of the District Court, in an action of debt, brought by the United States against Goodwin, under the 66th section of the "Act to regulate the collection of duties on imports and tonnage," March 2, 1799, for the value of certain goods alleged to have been fraudulently entered. The declaration stated, that after the passing of the Act of Congress, &c. certain goods, &c. were imported into the port of Philadelphia, &c. of which entry was made in the office of the collector of the port of Philadelphia, &c. to wit, five bales of blankets, &c. and that the goods, &c. so entered as aforesaid, were not invoiced according to the actual cost thereof at the place of exportation, to wit, at Liverpool, &c. with design unlawfully to evade the duties, or a part of the du-

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ties, upon the said goods, &c. and the said United States in fact say, that the said goods were of the value of 1500 dollars, &c. and that the said John Goodwin was the person making entry of the said goods, &c. as aforesaid, in the office of the said collector, &c. contrary to the form and effect of the said Act of Congress, &c. whereby, and by force of the said Act, &c. an action hath accrued, &c.

The goods belonged to persons in England, who were manufacturers, and who had shipped them on their own account. Goodwin, who made the entry, was their agent, and consignee of the goods. The goods were invoiced and entered according to what they had actually cost the manufacturers, but at less than the general market price or value at the place of exportation. The only question agitated in the Court below, was, whether such entry was conformable to the Act of Congress? The District Judge charged the jury, "that if the goods were entered according to invoices below the *market price*, as generally prevailing at the place of exportation, although according to the real cost and value thereof to the exporter at the place of exportation, the same were liable to forfeiture, and the defendant liable for the value thereof, &c.; that the law means, the general value of goods, including all costs, charges, &c. making the total in general paid by the importers, and not merely the value to a manufacturer, or casual fortunate purchaser."

The jury having found for the United States, judgment was rendered accordingly, upon which this writ of error was brought. It was assigned for error, that the District Judge had misdirected the jury, as above stated; and also, "that in the declaration of the plaintiff below, no offence against the Act of Congress is charged to have been committed by the defendant."

Several other errors were assigned, which it is not material to notice.

For the plaintiff in error, it was contended, that, upon a view of the different sections of the Act of Congress, goods should

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be invoiced and entered according to what they actually cost the exporter at the place of exportation, and not according to their market value there. The different sections speak of the entry being made according to the *cost, prime cost, actual cost, actual and real cost*, &c. 36. 53. 66. In case there is no invoice, by which to ascertain the *cost*, then only is the *value* ascertained by appraisement, to be the rule. The entry is to be made upon oath. The owner can tell what the goods cost him, but how can he safely swear to their general market value? The cost is fixed and ascertained—the market price fluctuating and varying—one thing to-day, another to-morrow.

Upon the exception to the declaration—All circumstances necessary to constitute the offence must be laid in the declaration, and *contra formam statuti* will not aid the omission. Chitty on Pleading, 357. 1 Salk. 212. Cro. Eliz. 231. 5 Com. Dig. 358. 360. Every word stated in this declaration may be true, and yet no offence committed. To constitute the offence, the goods must be entered—entered on an invoice—the invoice produced to the collector—the invoice not according to the actual cost; and it must be with intent to evade the duties, or a part thereof. Under this declaration, the entry might have been made without an invoice, or the cost stated in the invoice may have been *above* the actual cost, or the market price; or the entry may have been made by an agent; in either of which cases, no offence would have been committed.

For the United States, it was argued, that the entry must be made according to the general market value or price, at the place of exportation. The policy of the law requires this, in order to have a uniform standard. Were it otherwise, it would be impossible to detect frauds upon the revenue; for who can tell what an article cost the particular importer, if it differ from the general value? It is true, the words of the law are, *cost*, and *actual cost*; but they are, *cost at the place of exportation*—not the cost to the manufacturer, or particular exporter—nor at the place of manufacture, or elsewhere—but at the place of

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exportation. If more cost to the party were intended, there would be no need to say any thing about place. Accordingly, by the 66th section, if the collector suspects that the goods are not invoiced at a sum equal to that at which they have been *usually sold* at the place from which they are imported, he is to take them into custody, &c. until their *value* at the time and place of exportation, be ascertained, &c. Why so, if the special cost to the particular importer, be the rule to enter by? By that construction, he may be entering his goods legally and truly, and yet the collector be bound to take them into custody, under this 66th section.

As to the declaration, it follows the words of the Act of Congress. In laying an offence under a statute, there can be no better rule than to follow the terms of it. Here, the very words used in the Act of Congress, are used in the narrative. If, then, that Act creates an offence, this declaration must properly charge it. It states the entry to have been made with *intent unlawfully to evade the duties*, &c. This excludes the possibility of being innocently entered. It is said, that under this declaration they may have been entered without an invoice. But that is not so; for it says, "the said goods, so entered, &c. were not invoiced according to their actual cost," &c. This imports an invoice: They could not have been invoiced above their cost or value; for the declaration says, it was "with intent to evade," &c.

WASHINGTON, *Justice*, delivered the opinion of the Court. This is one of those cases which too frequently occur, in which the Court is called upon to interpret legislative expressions of doubtful import, without a clue to ascertain, with precision, what was the real intention of the framers of the law. After the closest examination of the points on which the controversy hangs, we can truly say, that our mind rather inclines to the opinion which we shall deliver, than that we feel a full confidence in its correctness.

The point of law to be decided in this case, arises out of the 36th and 36th sections of the Act imposing duties, the former of which prescribes the rules by which goods imported into the United States are to be entered, with a view to the ascertainment of the duties to be paid thereon; and the latter imposes the penalty to be incurred by a violation of those rules. But, to arrive at any thing like a correct understanding of the subject, we must turn to some other sections of this law; and from the whole, obtain, if we can, a view of the system by which this branch of the public revenue was intended to be secured.

In the first place, the owner, consignee, or factor, is required to make an entry in writings, and in the entry to specify the marks of the packages, and the prime cost, including charges, in the money in which the invoices are made out; and is also to produce the original invoices, or other documents received in lieu of them. The prescribed form of the entry specifies the value of the different articles subject to specific duties, as also the value of such as are subject to *ad valorem* duties. The entry is to be verified by an oath of the party making the entry, that it contains a true account of all the goods so imported, and of the cost thereof, including all charges; that the invoice produced is genuine, and the only one received by him, by which he is charged, or is to be charged, and that he knows of no other, and that if he should thereafter receive any other, he will communicate it to the office.

If, for want of an invoice, or for any other cause, an imperfect entry is made, so that the particulars of the goods are unknown, the goods are to pass to and remain in the possession of the collector, until the particular cost or value, as the case may be, shall be ascertained, either by the exhibition of the original invoices, or by appraisement, at the option of the importer; for which purpose two merchants are to be chosen, one by the collector and the other by the party, who are to value the goods; and their valuation is to be verified by the oath of the appraisers, that the prices affixed to each article are, to the

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best of their skill and judgment, the true and actual *value or cost thereof at the place of exportation.*

The mode of ascertaining the *ad valorem* rates of duty at the place of importation, is to be, by adding a certain per centage to the actual cost of the article, including all charges; commissions, outside packages, and insurance only excepted.

If the goods so entered, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereon, the goods themselves, on the value, are declared to be forfeited.

If the collector suspects that the goods are not invoiced as high as they have been usually sold for at the place from whence they were imported, he is to take and keep possession of them, until their value, at the time and place of importation, is ascertained, in the manner prescribed in relation to imperfect countries, and until the duties so ascertained, are paid or secured; but in case of a prosecution to enforce the forfeiture, such apprehension is not to exclude other proof of the actual and real cost of the goods at the place of exportation.

The whole cause turns upon the legislative meaning of the word *cost*. The District Attorney contends, that it is synonymous with value, or market price; and the importer, that it means the price they cost the individual at the place of exportation. The term is certainly of equivocal meaning, and is sometimes used to express the value of a thing, and sometimes the price paid for it. If possible, we must endeavour to find out from the law itself, the meaning attached to the terms, by the legislature who passed it.

The actual cost at the place of exportation, and the prime cost and all charges, are clearly used synonymously by the legislature; for the importer is required, by the thirty-sixth section, to make his entry according to the prime cost, (not saying at the place of exportation,) and charges; and the sixty-sixth section, which imposes the penalty, drops the expression

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of prime cost and charges, and substitutes the other, actual cost at the place of exportation.

What then constitutes the actual cost of an article at any particular place, which is purchased there for the purpose of being exported, and which is actually exported? The answer is, the price given, and every charge which attended the purchase and the exportation, paid or supposed to be paid, at the place whence the article is exported. The actual cost of a bale of goods purchased at Liverpool, is composed of the price paid for it, or, in other words, the prime cost and charges, including commissions on the purchase, the packages, if any, and if the goods were purchased at the manufactory, then it includes not only the prime cost, and all charges attending them to the place of exportation, but also the charges before mentioned, and perhaps many others. What is the meaning of the market price, or value of an article, at the place of exportation? The answer is, the price at which such articles are sold and purchased, clear of every charge but such as is laid upon it at the time of sale. This is not only the general meaning of the expression, but we conceive the legislature so understood it, because the collector is directed to have the articles appraised, in cases where he suspects that the invoice price is below that at which the same kind of goods have usually been sold in the place whence they were imported, and the invoice price, we know, must be the actual cost of the articles at the place of exportation.

Now, if these general definitions are correct, we are inclined to think that the section of the law which relates to the mode of estimating the *ad valorem* rate of duties, will assist us, in no small degree, in expanding the terms on which all the difficulty hangs.

These duties are to be estimated by adding a certain per centage to the actual cost, including all charges, commissions, &c. excepted. Now, if the actual cost of the article at the place of exportation, essentially includes all subsequent charges

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incurred at that place, including commissions, &c., and if the market price of the article at that place does not include them, then it would seem that it was unnecessary to declare, that to the real cost should be added all charges, if the real cost, as opposed to the market price, was intended.

We are aware, that it may be said in answer to this, that the charges were specified for the purpose of the exception, and perhaps this may have been the case; but certainly, if the actual cost necessarily includes all charges, the exception of commissions, &c. might, with strict propriety, have been made to the actual value, without specifying any particular part, of which the actual value was composed.

Having advanced thus far in our search after the legislative meaning of these expressions, let us inquire whether the other provisions of the law consist with the construction which the above course of reasoning seems to countenance; and how far it is practically conducive to the security of the revenue, the ultimate object of the whole system, and safe to the convenience of the individuals from whom that revenue is to be derived. For, if other parts of the law are at variance with this construction, or if its adoption shall be found in practice to subject the parties to be charged with the duties, to hardships which are unreasonable and unjust, these considerations may be sufficient to induce us to embrace the other construction which has been contended for.

In the first place, then, it is natural to expect that the legislature, when it imposes upon the collector the delicate duties of detecting and prosecuting every attempt to defraud the revenue by an under valuation of the goods subject to duty, and for this purpose clothes him with very extraordinary powers; would, at the same time, be inclined to furnish him with a standard, to which he might at all times appeal, without depending upon the integrity of the individual, whose conduct he is at liberty to suspect, and without an excuse for suspicion, where his conduct has been fair. If, then, the officers suspect that

the goods are invoiced, not below their real cost, but below the price for which they have been usually sold in the place whence they were imported, he is directed to take and retain possession of them until their value, at the time and place of importation, is ascertained by appraisers, and the duties paid or secured. This step must always be inconvenient and injurious to the importer, and therefore, we cannot suppose that the power was intended to be arbitrarily exercised, however slight the ground of suspicion might be. But who could say that the suspicion was obviously unfounded, if the price paid for the goods, and the charges, were the sum on which the duties were to be estimated? The invoice is the evidence of the party against whom the suspicion may be entertained; and whether that, or any other evidence of a fact with which the collector must be totally unacquainted, ought safely to be relied upon, may frequently be a mere pretext for suspicion, sometimes a justifiable ground of suspicion, but scarcely in any instance can the conduct of the officer, in this respect, be certainly condemned. But if the market price of the goods at the place of exportation, be that, including charges, upon which the duties are to be charged, then not only the fact to be ascertained, will correspond with the standard by which it is to be ascertained, but the standard itself is so far uniform and apparent, that the officer may, from other entries in his office, and from disinterested witnesses, at any moment test the fairness of any particular entry. It would seem strange, and in some measure, absurd, to test the verity of a particular act by a standard totally unlike the act, and bearing no relation to it; and it must be admitted, that this incongruity would frequently happen, if the market price of any article were made the standard for fixing the price which that article actually cost.

Again; in the form of the entry, as prescribed by law, the importer is required to state, not the actual cost of the articles at the place of exportation, but the value of those, subject to the different rates of *ad valorem* duties. The change of ex-

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Most certainly, it is the making of an entry upon an invoice below the actual cost of the goods, with design to evade the duties. No matter how fraudulent the invoice may be, still, if the entry be made according to the actual cost, the person making the entry is guilty of no offence. Neither is he guilty of any offence, if he make the entry upon an invoice above the actual cost of the goods; because, in that case, the revenue is not defrauded, but is benefited. But this declaration makes the offence to consist in the existence of an invoice which did not agree with the actual cost, and upon this declaration, the United States were not bound, at the trial, to show that the entry did not correspond with the actual cost; for, if the fact had been, that the entry did correspond with it, or was even higher, still, the United States were entitled to a verdict, if the invoice was shown to be lower than the actual cost, no matter at what prices the entry was made. Besides, the invoice is generally the act of the exporter, and the entry always that of the importer, consignee, or agent. The declaration, therefore, imputes to the consignee the offence of the exporter, and makes him liable for it; and this too, although the fraudulent intention is imputed by the declaration to the person making the invoice, and not to him who made the entry, and is prosecuted for the fraud.

Upon this ground, therefore, the judgment of the District Court must be reversed.

Meredith, Chauncey, and Rawls, for the appellant.

Dallas, District Attorney, for the United States.

Craig vs.

Knox vs. Walton et al.

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vs. WALTON & CAMAN.

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But the question in this case is as to matters of fact, appearing by the evi-
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Goodwin vs. The United States.

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Upon this ground, therefore, the judgment of the District Court must be reversed.

Meredith, Chauncey, and Hawle, for the appellant.

Dallas, District Attorney, for the United States.

Craig vs. Cummings.

CRAIG vs. CUMMINGS.

Action by Craig, a citizen of Kentucky, against J. P. a citizen of New-Orleans, and Cummings, a citizen of Pennsylvania, upon whom only the process was served, and *non est inventus* returned by the Marshal as to J. P. Cummings entered a plea to the jurisdiction, stating that J. P. was not a citizen of Pennsylvania, but was a citizen of New-Orleans; to which there was a general demurrer by the plaintiff.

By the law and practice of Pennsylvania, if the sheriff return *non est inventus* as to one defendant, and service of the writ on the other, the plaintiff may proceed against the latter on a joint contract, stating in the declaration the return of the writ.

The defendant who has been served with process, cannot avail himself of the want of jurisdiction in the Court, as to a person who is severed from him, and is no longer to be considered a defendant in the cause.

ACTION by Craig, a citizen of Kentucky, against J. P. a citizen of New-Orleans, and Cummings, a citizen of Pennsylvania. The process was served on Cummings only, and *non est inventus* as to J. P.; and the declaration is against him only, reciting the writ and the return. Plea to the jurisdiction, stating that J. P. was not and is not a citizen of Pennsylvania, but was and is a citizen of New-Orleans. To this there was a general demurrer.

WASHINGTON, Justice, delivered the opinion of the Court. If J. P. had been served with process in this case, he might have pleaded to the jurisdiction of the Court, because, by the 11th section of the Judicial Law, the Court cannot entertain the suit, except an alien be a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. But neither Craig nor J. P. is a citizen of this state, where the suit is brought. It is true, that under another

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KNOX vs. Walton et al.

KNOX vs. WALTON & CAMAN.

A report of referees, made under an order of Court, set aside, because of a plain and palpable mistake as to matters of fact, appearing by the evidence of the referees.

IN this case, which came on upon exceptions to the report of referees under an order of the Court, the report was set aside, upon the ground of a plain and palpable mistake of the referees as to matters of fact. The mistake appeared by the examination of the referees themselves.

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Armroyd et al. vs. Williams et al.

Whatever may be done by foreign tribunals, in reference to the established principles of the law of nations, relative to the conclusiveness of sentences of foreign Prize Courts, the Courts of the United States will not, for purposes of retaliation, depart from the fixed principles of the law of nations, which declares that they are conclusive.

APPEAL from the District Court. The schooner Fortitude, belonging to Williams and others, the libellants, citizens of the United States, with a cargo taken in at Martinico, and a part of her outward cargo carried from the United States, sailed on the 20th of August 1809, from the said island to New-London, consigned to one of the libellants. On the next day, she was captured on the high seas by a French privateer, and carried into St. Martin's. The cargo and vessel were sold, by order of the governor of St. Martin's, at public auction. Ninety-seven hogsheads of molasses, part of the cargo, were sold on the 15th of October, and sent to Philadelphia, consigned to Armroyd & Co., restitution of which was demanded by the libellants, and refused; upon which this libel was filed.

The molasses was claimed as the *bona fide* property of Richardson & Carty, of St. Martin's, and others. The claim states, that at the time of the capture, and before war existed between England and France, the Fortitude, on her return from Martinico, a colony under the dominion of Great Britain, where she had been trading with the enemies of France, contrary to the decrees of France, was captured by a French privateer as prize, carried into St. Martin's, a French possession, and, with her cargo, sold by order of the governor; that the molasses claimed was purchased, *bona fide*, by certain persons, and afterwards sold by them to those for whom the claim is made; that on the 12th of October 1809, the Court of Prize, established at Guadaloupe, a French island, condemned the said schooner Fortitude and her cargo.

The sentence of the Court at Guadaloupe, after setting forth the purport of the papers of the schooner, proceeds thus:—

Armroyd et al. vs. Williams et al.

* It results from these papers, that the schooner is the property of a citizen of the United States; that she sailed from New-London, bound to Martinico, where she sold her cargo, and took in another cargo for New-London, and therefore she has incurred the penalty pronounced by the Milan Decree, dated September 17th 1807, [which is set out,] and after hearing the opinion of the inspector, &c., we declare the said schooner to have been duly captured, and to be forfeited to the captors. Consequently, she and her cargo are awarded to the captors, to be sold, if the sale has not already taken place," &c.

A *pro forma* decree having been made by the District Court in favour of the libellant, an appeal was prayed to the Circuit Court.

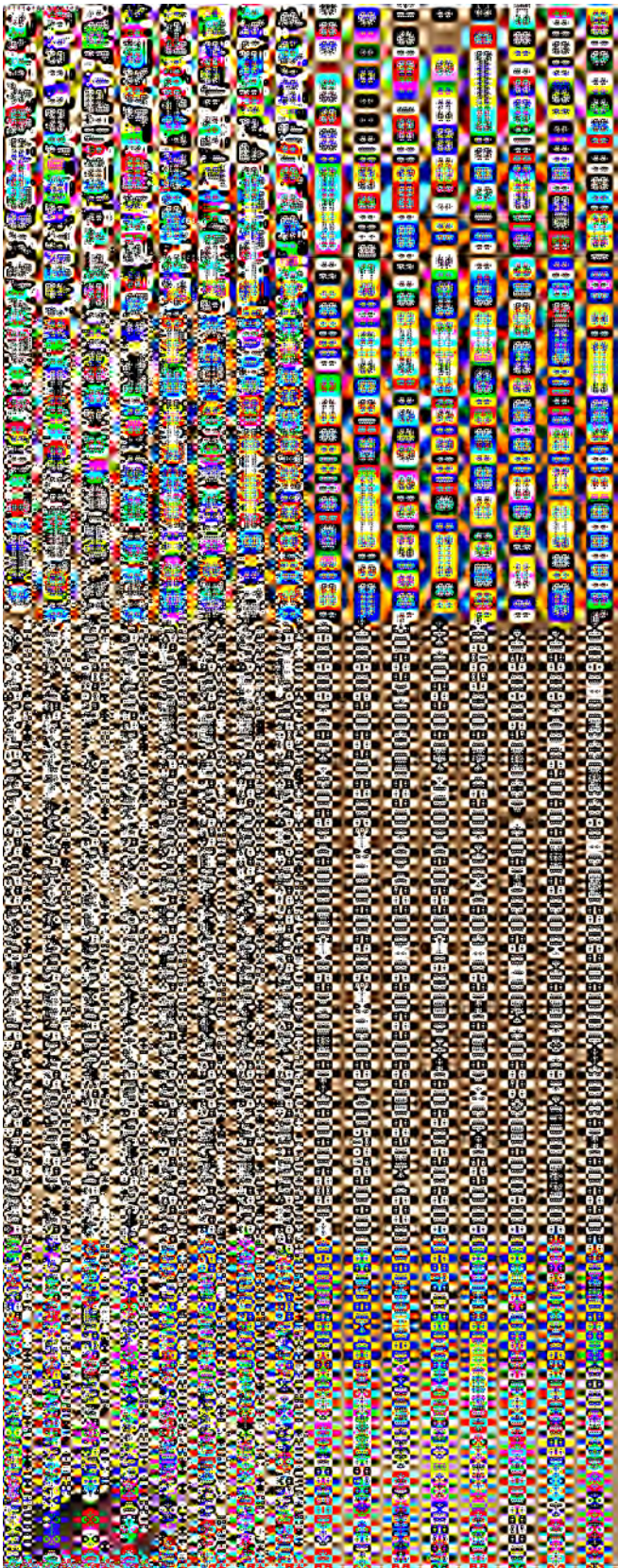
The points made by Hare and Rawle, counsel for the appellees, were—First. That the foreign sentence, professing to proceed upon the Milan Decree, acknowledged to be a violation of the law of nations, is not valid to change the property, and ought to be disregarded. 2 Ersk. Inst. 793. 2 Stra. 1078. 1 Marsh. 397. Second. That the condemnation and sale were fraudulent. Third. That as France disregards the sentences of foreign Courts, we are not bound by those of her Courts. Marsh. 391. 1 Emerig. 458. 2 Peters's Adm. Rep. 331.

Cases cited on the other side: 5 East, 155. 3 Bos. & Pull. 547. 4 Cra. 434. 7 T. Rep. 695. 4 Cra. 271.

WASHINGTON, Justice, delivered the opinion of the Court. The question is, is the sentence of the Prize Court at Guadeloupe conclusive to divest the right of the original owners of the property, condemned by that sentence, and to vest it in the purchaser under it? The doctrine of the British Courts, acknowledged and adopted by the Courts of the United States, is, that the sentence or decree of a Court of exclusive jurisdiction, operating directly on the thing itself, is conclusive between the same parties, upon the same matter coming directly or incidentally in question, in another Court of co-ordinate jurisdic-

tion, not only of the *right* which it establishes, but of the *fact* which it directly decides. This doctrine applies emphatically to the decisions of the Courts of Admiralty, whether foreign or domestic. They are Courts of the law of nations, and to their proceedings all the world are parties; that is, any person having an interest in the thing which forms the subject of the suit, may make himself a party, and contest the right of the libellant. It is the conclusive effect of such a sentence upon the *facts* decided, which has given rise to the many questions which have perplexed the Common Law Courts of Great Britain and the United States, in respect to warranties of neutrality. If the foreign sentence has proceeded upon ground obviously inconsistent with the neutral rights of the captured, it will be disregarded by the Courts of Common Law, in deciding the question whether the warranty has been falsified; not because the fact which it professes to decide is not conclusively decided by the sentence, but because it concludes nothing in respect to the point at issue—namely, the neutrality of the property, or the neutral conduct of the owner.

But as to the direct effect of the sentence upon the thing condemned, no doubt has ever been entertained, that it is conclusive to work a change of the property, so long as that sentence remains in *force*, unreversed by a superior and appellate tribunal. If the principle be thus general and inflexible, it is unimportant whether the foreign sentence be erroneous or not, or whether the error consist in the mistake of the Court in matter of fact, or a misconception of the acknowledged law of nations, or is founded upon foreign laws avowedly repugnant to the law of nations. The validity of the sentence rests upon this ground, that it is not examinable by any other Court having a concurrent jurisdiction over the subject; and consequently, the objection is met *in limine*, before the nature of the error committed can be got at. And in the essence of the thing, where is the difference between a decision obviously unjust, and unwarranted by the facts on which it is founded, or by the acknow-



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Armroyd et al. vs. Williams et al.

wrong. Whether the adoption of the rule of reciprocity, in any case, would be proper or not, need not now be decided. It certainly does not prevail, even in England, in the Common Law Courts; and it has never, to our knowledge, been admitted into the Prize Courts of our own country. We do not, however, mean to say, that it ought not. In matters of salvage, where the amount of compensation rests in the discretion of the Court, and perhaps in other instances, where no moral principle, nor established doctrine of law, would be violated by retaliating upon foreign Courts their own rule, there is possibly no other objection to the rule of reciprocity in the Admiralty Court, except the uncertainty in the law, which the rule is calculated to introduce. But most certainly, a Court which means to act correctly, will never depart from the rule of right, or reverse fixed principles of law, because a foreign tribunal has done so.

The rule of law which governs the Court in deciding this case, is, in our opinion, a wise one; and it has appeared otherwise only during a few years past, because the regular order of things has been disturbed and disfigured by the violence and rapine of the belligerents. We confess that we sicken with disgust, in giving to the appellees the benefit of a general principle of law, which compels submission to so daring an outrage upon our neutral rights. But we must obey the law, and leave to our government the task of protecting its citizens.

Sentence reversed.

Read *vs.* Wilkinson.

READ *vs.* WILKINSON.

The want of funds in the hands of the drawee of a bill of exchange, renders notice to the drawer of the nonacceptance or nonpayment, unnecessary.

Where a bill of exchange is accepted, conditionally, the holder, who would change the acceptor, must show performance of the condition.

Any offer on the part of the debtor, operates to remove the bar of the statute of limitations, which fairly interpreted amounts to a promise to pay, or to an acknowledgment of the debt, or of some debt; as if the debtor says, "he will pay, if the demand is proved;" or a promise to account, though he adds, "that he owes nothing."

If any thing is added which negatives a promise of payment, or an acknowledgment of a debt, it must be considered as qualifying every expression; as if A says he owes the debt, "but will not pay it, and will avail himself of the statute of limitations."

If a promise to pay a debt, barred by the statute of limitations, is conditional, the remedy for the recovery of the debt is not revived, unless the condition is performed.

THE action was founded, amongst other items of account, upon a bill of exchange for six hundred and twenty pounds, drawn by the defendant on P. Noland, February 2d, 1790, in favour of the plaintiff, dated in Kentucky, which was never protested; but Wilkinson was informed that it was not paid. He afterwards paid a part of it, for which a receipt was endorsed. He afterwards, by letter to the plaintiff, plainly intimated that he was to furnish the drawee with funds to pay the bill.

Secondly; upon a bill drawn by general Moyland of Philadelphia, on the defendant, in Kentucky, in 1790, in favour of the plaintiff, and accepted by endorsement, "on the terms mentioned in a note of the drawee."

Read vs. Wilkinson.

The plea principally relied upon, was the Act of limitations, to which the plaintiff replied, a new promise within six years before action. To support the replication, the plaintiff relied upon a letter addressed by the defendant to the plaintiff, dated the 19th of April 1805, (this action having been entered in 1808,) in which he states that he had been prevented from forwarding his papers to Mr. Ingersoll, for the final adjustment of the plaintiff's claim, but that he will immediately do so; and then adds, that "he shall hold himself bound, in honour and law, to abide his decision." On the 22d of the same month, he writes to Mr. Ingersoll, and encloses him a sealed packet containing his papers, and also an arbitration bond, executed by himself, submitting the dispute to his (Mr. Ingersoll's) arbitration. He requests Mr. Ingersoll to obtain a similar bond from the plaintiff; and, in that event, to break the seal of the packet, and proceed to the adjustment. But if the bond is not given by the plaintiff, he, Mr. Ingersoll, is then to return the packet with the seal unbroken. This letter was shown to the plaintiff, who declined the arbitration. General Wilkinson came to Philadelphia with his family, in 1796, and remained there some months.

It was contended, by Dallas and Ingersoll, for the defendant, that the plaintiff could not support his action for the six hundred and twenty pounds bill, because it was not protested; nor upon the defendant's acceptance of Moyland's bill, because it was conditional, and the plaintiff had not shown that the condition was performed.

As to the Act of limitations, they insisted that the letters relied upon, did not amount to a promise to revive the action, and did not get rid of the plea.

Levy, for the plaintiff, contended, as to the bill for six hundred and twenty pounds, that no protest was necessary: first, because it appeared in evidence that the plaintiff had no funds in the hands of the drawee: secondly; that he had paid part

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of that bill; and, thirdly, that he had afterwards acknowledged the debt, and promised to send forward funds to pay it. (a)

As to Moyland's bill, that the defendant should produce the defendant's note, referred to in the acceptance; if not, it should be taken as absolute.

As to the Act of limitations, he referred to Salk. 29. Cowp. 548. Wall. Rep. 75. Bull. N. P. 145. 149. 2 T. Rep. 760.

WASHINGTON, Justice, charged the jury. As to the objection to the want of protest of the six hundred and twenty pounds bill, the plaintiff is right in his law. The want of funds in the hands of the drawee, the drawer's payment of part of it, and his subsequent acknowledgment of the debt, and promise to send funds to take it up, are either of them sufficient to dispense with notice and protest.

Secondly; as to Moyland's bill, the defendant is right. It was conditional, and it is incumbent on the plaintiff to show the condition performed.

Thirdly; as to the Act of limitations. A promise to pay, within the time prescribed by the Act of limitations, has always been held sufficient to remove the bar, and revive the remedy, which is alone defeated by the Act of limitations. Although it was once doubted whether a bare acknowledgment of the debt was sufficient to revive the remedy; it was settled long before the Revolution, and we think, rightly, that it was. For an acknowledgment of a debt for a valuable consideration, if not amounting to a promise, is at least evidence of it sufficient to create a debt originally; and if so, it is certainly sufficient to revive the remedy, where that has been defeated by the Act of limitations. The decisions in England, particularly of late years, have gone great lengths in construing slight expressions into a promise or acknowledgment. We do not say that we

(a) See, on this subject, Chitty, 121, 122. 48. Baker vs. Gallagher, in this Court.

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should feel disposed to go so far. As the commercial spirit of that country has increased, the Courts have shown great anxiety to remove bars against the payment of just debts, and have discountenanced, as much as possible, the Act of limitations, which was once viewed with great favour. We are of opinion, that any offer on the part of the debtor, operating to remove the bar created by that Act, should, upon a fair interpretation of the meaning of the party, from all that he has said, amount either to a promise, or to an acknowledgment of the debt, or of some debt. Thus, a promise to pay, if the creditor will prove his demand, is sufficient. A promise to account, though the debtor adds that he owes nothing, may amount to a promise to pay, if it should appear upon the account that any thing is due, for why account, if the debtor does not mean to pay what may be found due? But any thing which is added, going to negative a promise or acknowledgment, must be considered as qualifying every other expression, and as the whole must be taken together, it amounts to a refusal to pay, which can never be construed into a promise to pay: as if the debtor say he owes the debt, but will not pay it, and will take advantage of the Act of limitations. (a)

Another rule is perfectly clear: if the promise is conditional, the remedy is not revived, unless the condition is performed. The creditor cannot garble what is said, and so avail himself of the promise, and reject the condition. He must take the promise on the terms offered, or not avail himself of it at all. This latter rule is conclusive of the present cause. The obvious meaning of the defendant's letter of the 19th of April 1805, strengthened particularly by his letter to Mr. Ingersoll, three days afterwards, and which was shown to the plaintiff, and both should be taken together, is, that the defendant consented to pay what might be found due, provided the plaintiff

(a) See the following cases: 4 Bunn. 1099. 5 Bunn. 2630. 3 T. Rep. 790.

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would execute an arbitration bond, and that Mr. Ingersoll should be the arbitrator. This offer was rejected, and of course the promise amounted to nothing. The replication, therefore, is not supported, and the verdict should be for the defendant, upon the plea.

The plaintiff suffered a nonsuit.

Clark vs. The United States.

CLARK vs. THE UNITED STATES.

The Sea Nymph and her cargo, were seized for a violation of the non-importation laws, in importing the goods seized into the port of Philadelphia. The vessel and part of her cargo were seized in the river Delaware, and part of the cargo after it had been landed.

The ninth section of the judiciary Act of the 24th of September 1789, assigns to the District Courts jurisdiction of all cases, purely of admiralty maritime jurisdiction, if they arise under the laws of impost, navigation, and trade; where the seizure is made in waters navigable for vessels of ten tons burthen from sea. In all other cases, where the seizure is on land, or waters of less depth, the jurisdiction is on the common law side of the Court.

An information *in rem* against the thing itself, in a case of admiralty and maritime jurisdiction, is not a suit at common law, but an admiralty proceeding, and does not require a trial by a jury.

Informations *in rem*, on the admiralty side of the District Courts, for forfeitures incurred under the laws of impost, have been sanctioned by the Supreme Court of the United States.

If a party, charged with a forfeiture under the laws of the United States, shall, in his answer, on oath, to the information, furnish evidence against himself, the Court, in an action of debt brought against him for a penalty under the same law, would reject his confessions, if offered in evidence.

APPEAL from a sentence of the District Court, condemning the Sea Nymph and her cargo, for a violation of the non-importation law, (Vol. IX. of Laws, page 243.) The ground of forfeiture is, that the goods in question were imported in this vessel into the port of Philadelphia, from Port-au-Prince, a possession of France, contrary to law. The Sea Nymph and part of her cargo were seized at the port of Philadelphia, on the river Delaware, and part on land; and the question made in the District Court, and insisted upon in this, is, whether the

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 Clark vs. The United States.

not belong to that jurisdiction, and which, therefore, are intended by this law to be assigned to that jurisdiction. In the former case, we conceive it to be unimportant, where the seizure is made, whether on land, or on waters of a depth less than a vessel of ten tons could navigate; in the latter case, the jurisdiction, according to this law, must be decided by the place where the seizure is made. In this way only, can the *dictum* of the Supreme Court of the United States, in the case of the *Betsey*, be reconciled with former decisions, and with established principles of law; for surely the Court never intended to say, that the jurisdiction of the admiralty, in a case of strict admiralty jurisdiction, would depend upon the place where the seizure was made. There was nothing in that case to call for such a decision.

The case of the *Vengeance* is the leading one on this subject, and is referred to in the case of the *Betsey* as governing that; and the decision in the former case, appears to us conclusive as to that now under consideration. It was an information *ex rel.*, in the District Court, for exporting from the United States to a foreign country, arms and ammunition, contrary to law. It was contended, upon the broad ground of the admiralty jurisdiction, that it was not a case belonging to that jurisdiction, because it did not arise wholly upon the sea; exportation being an act arising partly on land, and partly on the sea. The operation of the ninth section of the Judicial Law, which assigns to the admiralty, cases of seizure under laws of impost, &c., was not hinted at in the argument, and the Court decided that it was a case of admiralty and maritime jurisdiction, because *exportation is entirely a water transaction*. If that was a case of admiralty jurisdiction, because it was a water transaction, is not this, too, a water transaction? What is the offence created by the non-intercourse law? It is the importation of goods into the United States, from French or English possessions. But to complete the offence, it is not necessary that the goods should be landed, if they are brought from these

 Clark vs. The United States.

countries with intention to be landed. For we find that even the putting of goods on board of a vessel, with intention to import the same into the United States, is an offence against the law, and subjects the vessel and goods to forfeiture; and, consequently, they may be seized before the vessel has arrived at her port of destination, or even before she has entered the river. This, then, is a stronger case of admiralty jurisdiction, than that of the *Vengeance*. Even in the case of the *Sally*, where the seizure was at Nottingham, within the body of a county, the Court considered the question of jurisdiction settled by the case of the *Vengeance*, and thereby pronounced it to be a case of admiralty jurisdiction. If, then, this be a case of admiralty jurisdiction, because wholly a water transaction, it can hardly be contended, that the offender, by landing the cargo, can oust the jurisdiction of that Court, and convert a maritime into a common-law cause. The rule is clear, that if the original cause arise at sea, and other matters happen on land, depending thereon, as if a thing be taken at sea, and afterwards brought to land, the admiralty retains its jurisdiction over the subject. See 2 Bac. 178. So, too, if the cause of forfeiture arise at sea, the bringing of the thing forfeited to land, will not oust the admiralty of its jurisdiction.

This brings us to the consideration of the third point, which is, that the eighteenth section of the law, under which this forfeiture is claimed, has prescribed a common-law mode of recovery; and, consequently, that the trial must be conformable to that practised in the Courts of common law. If the premises be correct, the conclusion must be granted. The recovery is to be by action of debt, by indictment, or information. It is admitted, that the two first of these remedies are inapplicable to cases where the thing forfeited is demanded, although they are quite proper for the recovery of the penalties, or for enforcing personal punishment. The question then is, whether a trial by jury is indispensable, where the proceeding is by information against the thing itself? Because, if the object be to

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punish the offender in his person or property, generally, it is not questioned but that the trial of an information must be by jury.

What is there in the Constitution or Laws of the United States, which requires the trial to be by jury, in the case of an information *in rem*, on the admiralty side of the District Court? The former preserves that mode of trial in suits at common law. But an information *in rem*, in a case of admiralty jurisdiction, is not a suit at common law, but an admiralty proceeding, where the trial never is by jury. As to the latter, the saving clause in the ninth section of the Judicial Law, obviously means, that in cases where the jurisdiction of the admiralty is not exclusive, a party may, at his election pursue his common law remedy, if the common law be competent to afford him redress. It has no allusion to the mode of trial, in any case; for that would, without any provision of law, adapt itself to the remedy to which alone the saving refers. But what places this subject beyond all doubt, is, that informations *in rem*, on the admiralty side of the District Court, for forfeitures incurred under laws of impost, navigation, and trade, of the United States, have been common in the practice of our Courts as an admiralty proceeding, as much so as the proceeding by libel. The correctness of this practice has been brought directly into the view, and received the sanction of the Supreme Court of the United States, in the case of the *Vengeance*, when it was decided that the information *in rem*, is in the nature of a *libel*, and to be tried, according to the course of the admiralty, without jury. The mode of trial is here settled by the highest tribunal in the United States, and the term *information*, in respect to admiralty proceedings, had received a precise meaning, before it was used by Congress. We think we are warranted in presuming, or are rather bound to conclude, that this decision was known to the legislature, and that the term was used in this law, in reference to the practice of the Courts thus solemnly recognised. If, then, the information *in rem* in a civil

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port of admiralty and maritime jurisdiction, by of the nature of a libel, we are compelled to say that the use of the expression in this law, does not vary this case from those of the *Vengeance*, the *Sally*, and the *Betsy*.

Another objection made to the mode of trial in this case, is that the defendant may be compelled to give evidence against himself, contrary to a well-established principle of law, which excuses a man from answering, upon oath, any thing which may subject himself to a forfeiture. If forfeiture of the thing, which forms the subject of the suit, be meant, that point is settled by the decisions which have been mentioned; and if, in an action of debt, or an indictment for the penalty, the confession should be offered in evidence against the defendant, and he is entitled to the benefit of the rule which is contended for, the Court would, of course, reject the evidence for that reason, and in this way the difficulty would be got rid of.

Upon the whole, we are of opinion, that, as to the mode of trial, there is no error in the sentence of the District Court.

Cases cited by the appellant, *Fitzg.* 66. *Cro. Ja.* 643. 1 *Shaw.* 118. 4 *Black. Com.* 304, 305. 6 *Mod.* 143. 7 *Mod.* 99. 3 *Bur.* Ab. 635, 636. 4 *Cra.* 452. 3 *Atk.* 276. 2 *Ves.* 245. 456. 3 *Black. Com.* 262. 4 *Black.* 308. 2 *Rob. Rep.* 845. 2 *Cra.* 406. 4 *Cra.* 446. 1 *Rob. Rep.* 271.

Cases by appellees, 6 *Rob.* 341. 347. 4 *Dall. Priestman's case.* 4 *Cra.* 216. 347. 3 *Dall.* 297. 2 *Cra.* 64. 3 *Cra.* 217. 456. 3 *Black.* 68. 106. 1 *Woodson*, 137, 138. 2 *Brown's Civ. Law*, 123, 124. *Dougl.* 615. *Yelv.* 135. *Bur. Rep.* 78. 1 *Dall.* 48. *Reeve's Shipping*, 255. *Peake's Nisi Prius*, 8, 9. 4 *Black.* 281. 3 *Dall.* 37. 175.

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1. If a sufficient reason for abandonment is stated by the assured to the underwriters, when he offers to abandon, he need not communicate other or additional causes, though they were known to him; if the underwriters refuse to accept the abandonment. *Dederer vs. The Delaware Insurance Company*, 61.
2. Insurance, 55.

ACTIONS.

If the plaintiff makes advances for another before and after his death, in an action against the executor, for money laid out and advanced for the testator, the advances made after the death of the testator, cannot be recovered. *Hourquebie et al. vs. Stephen Girard, adm.* 212.

ADMINISTRATION.

Letters of administration to the estate of Lehering having been granted by the proper authority, the Court will take the fact to be, that the person is dead, who is represented by the administrator. *Kelland vs. The Administrator of Lehering*, 201.

AFFIDAVIT.

1. The plaintiff was admitted to swear his affidavit; and being sworn, at the instance of the defendant, he was permitted to state, that a particular item of his claim had not been passed upon by arbitrators, who had examined the accounts between the parties. *Gernon vs. Decaline*, 130.
2. Bail, 3.

AGENT.

If an agent or factor sell the goods of his principal, and has not received payment, or having received the same, invests the proceeds in property for the use of his principal, or mends and puts it away; the principal has a right thereto, and is entitled to the profits thereon, against the agent or his general creditors. *Aliter*, if the agent applies the money to his own use, and charges himself with it in account. *Hourquebie et al. vs. Stephen Girard, adm.* 212.

AGENT AND FACTOR.

1. The declarations of an agent for the defendant, by whose officers insurance had been made for his principal, were not admitted to prove the liability of the principal for the premium. *Millist et al. vs. Peterson*, 81.
2. When the insurance has been imperfectly made, and not altogether neglected, it may be questioned, whether the agent is liable for more than the damages, equal to the change of the indemnity which would have been afforded by the exact execution of the order. *De Tissett vs. Crousillat*, 132.
3. A claim of damages against an agent, upon the orders of the principal, which he is charged with neglecting, is not entitled to favour, if the order has been couched in doubtful terms. *Ibid.* 132.
4. If a reasonable diligence was used by the agent to effect the insurance, he is not liable. *Ibid.* 132.
5. The neglect of the agent to give his principal notice of his having been unable to execute the order for insurance, will make him liable in damages. *Ibid.* 132.
6. An action cannot be maintained against the agent, for transactions with his principals through him, unless a specific agreement is made with the agent, that he will be personally liable for the acts of his principal. *Bradford et al. vs. Eastburn*, 219.
7. Where the agent has acted illegally, in refusing to deliver goods sent by his principal to him for others, upon a contract for their sale and delivery made with the principal, the remedy is by action against the principal, and not against the agent. *Ibid.* 219.
8. If a factor sell, *bona fide*, the goods of his principal for a valuable consideration, by assigning over the bill of lading, the sale is valid against the principal. But such a sale is not valid, unless the bill of lading for the goods has been received by the factor. *Walter et al. vs. Ross et al.* 283.
9. The principal may follow the money in the hands of the purchaser, and if not paid to the factor, he may recover it. *Ibid.* 283.
10. A factor has no property or interest in the goods beyond his com-

AGENT AND FACTOR.

subsidia, and cannot control the right of the principal over them.

Ibid. 283.

AGREEMENT.

Agent and Factor, 6, 7.

AMENDMENT.

By the provisions of the Act of Congress, a variance, which is merely matter of form, may be amended at any time. *Swell vs. Briddle*, 260.

APPROPRIATION OF MONEY.

1. Where money belonging to A and C, arising out of a joint transaction between him and C, has, with the knowledge of B of the interest of A therein, been placed by the agent of A and C to the credit of B and C, who are partners, and C is indebted to his partner B; B cannot apply the money of A to the credit of C, in satisfaction of his claim upon him. *Penderick vs. Sumner*, 41.
2. M and R had become, by separate engagements, liable to make up any deficiency of the proceeds of property assigned to the plaintiffs to pay the debts of another, for equal portions of which they were each liable as co-sureties. After the deficiency was ascertained, an account was rendered, in which the proceeds of the sale were credited to both M and R. R. having become insolvent, the Court refused to permit the plaintiffs to apply the proceeds of the property to discharge the whole of R's engagement, and to claim the whole deficiency from M; the plaintiffs having applied the proceeds, in the first instance, to the discharge of both debts. *Bank of North America vs. Shreve*, 47.

ASSAULT.

An assault is an offer or an attempt to do corporal injury to another, as by striking at him with the hand or with a stick, or shaking the fist at him, or presenting a gun or other weapon, within such distance as that a hurt might be given; or drawing a sword, and brandishing it in a menacing manner—each of those acts to be done with intent to do some corporal harm to another. *The United States vs. Hand*, 435.

ATTORNEY.

Writ of Attorney.

AVERAGE.

1. Where, in the course of a voyage, a ship, from ordinary duty, requires to be repaired at an intermediate port, the expenses of such

AGENT.

If an agent or factor sell the goods of his principal, and has not received payment, or having received the same, invests the proceeds in property for the use of his principal, or marks and puts it away; the principal has a right thereto, and is entitled to the profits thereon, against the agent or his general creditors. *Aliter*, if the agent applies the money to his own use, and charges himself with it in account. *Houquebie et al. vs. Stephen Girard, adm.* 212.

AGENT AND FACTOR.

1. The declarations of an agent for the defendant, by whose officers insurance had been made for his principal, were not admitted to prove the liability of the principal for the premium. *Millett et al. vs. Peterson*, 51.
2. When the insurance has been imperfectly made, and not altogether neglected, it may be questioned, whether the agent is liable for more than the damages, equal to the charge of the indemnity which would have been afforded by the exact execution of the order. *De Tillet vs. Crouillard*, 132.
3. A claim of damages against an agent, upon the orders of the principal, which he is charged with neglecting, is not entitled to favour, if the order has been couched in doubtful terms. *Ibid.* 132.
4. If a reasonable diligence was used by the agent to effect the insurance, he is not liable. *Ibid.* 132.
5. The neglect of the agent to give his principal notice of his having been unable to execute the order for insurance, will make him liable in damages. *Ibid.* 132.
6. An action cannot be maintained against the agent, for transactions with his principals through him, unless a specific agreement is made with the agent, that he will be personally liable for the acts of his principal. *Bradford et al. vs. Eastburn*, 219.
7. Where the agent has acted illegally, in refusing to deliver goods sent by his principal to him for others, upon a contract for their sale and delivery made with the principal, the remedy is by action against the principal, and not against the agent. *Ibid.* 219.
8. If a factor sell, *bona fide*, the goods of his principal for a valuable consideration, by assigning over the bill of lading, the sale is valid against the principal. But such a sale is not valid, unless the bill of lading for the goods has been received by the factor. *Walter et al. vs. Ross et al.* 283.
9. The principal may follow the money in the hands of the purchaser, and if not paid to the factor, he may recover it. *Ibid.* 283.
10. A factor has no property or interest in the goods beyond his com-

AGENT AND FACTOR.

ministry, and cannot control the right of the principals over them.
Ibid. 283.

AGREEMENT.

Agent and Factor, 6, 7.

AMENDMENT.

By the provisions of the Act of Congress, a variance, which is merely
matter of form, may be amended at any time. *Paul vs. Bridle*, 200.

APPROPRIATION OF MONEY.

1. Where money belonging to A and C, arising out of a joint transaction between him and C, has, with the knowledge of B of the interest of A in the same, been placed by the agent of A and C to the credit of B and C, who are partners, and C is indebted to his partner B; B cannot apply the money of A to the credit of C, in satisfaction of his claim upon him. *Flunderwick vs. Sumner*, 41.
2. M. and R. had become, by separate engagements, liable to make up any deficiency of the proceeds of property assigned to the plaintiffs to pay the debts of another, for equal portions of which they were also liable as co-obligors. After the deficiency was ascertained, an account was rendered, in which the proceeds of the sale were credited to both M. and R. R. having become insolvent, the Court refused to permit the plaintiffs to apply the proceeds of the property to discharge the whole of R.'s engagement, and to claim the whole deficiency from M.; the plaintiffs having applied the proceeds, in the first instance, to the discharge of both debts. *Bank of North America vs. Alfred*, 47.

ASSAULT.

An assault is an offer or an attempt to do a corporal injury to another, as by striking at him with the hand or with a stick, or shaking the fist at him, or presenting a gun or other weapon, within such distance as that a hurt might be given; or drawing a sword, and brandishing it in a menacing manner—each of those acts to be done with intent to do some corporal hurt to another. *The United States vs. Hunt*, 435.

ATTORNEY.

Writ Warrant of Attorney.

AVERAGE.

1. Where, in the course of a voyage, a ship, from ordinary duty, requires to be repaired at an intermediate port, the expenses of such

age. *Ball vs. The State*

losses arose in a
misconduct or unskilful
in the ordinary circum

plaint cannot arrest the
Ball vs. Briddle, 200.
consent of bail, and the
inserted in the decla-

further satisfaction, as
to bail, because the affi-
davit makes the party making
the affidavit. *Oliver vs.*

after the death of C. S.
and divided among the
be living at the death of
en, and before the death
after the decease of C. S.,
of A. M., and the plan-
of *Oliver vs. Ball*, 406.

clearly prove, that a pos-
sibility of the will would not
bankrupt, and the
of the bankrupt of bank-

of A. M., formed no part
of the estate, and the
under the fifth section of
and, therefore, they could
bankrupt, under the provi-
sions, and those of the bank-

BANKRUPT AND BANKRUPTCY.

ript law of the United States; differ in relation to the contingent interests of the bankrupt; and it is clear, that by the most liberal construction of the law, the interest of the husband in the estate of his wife, under the will of A. H., did not pass to the assignees. *Ibid* 406.

6. The provisions of the thirteenth section of the bankrupt law, do not affect this question; they do not require an assignment of contingent interests, but relate to their disclosure by the bankrupt. *Ibid* 406.

BARRATRY.

1. The nature of barratry, and the principles of law relating to it. *Deader vs. The Delaware Insurance Company*, 61.
2. It is not essential to constitute barratry, that it should be to the interest of the master. *Ibid* 61.
3. If the act of the master were intended to benefit the owner, although mistaken, it cannot be barratry, because it was not fraudulent, or criminal. *Ibid* 61.
4. Acts of the master may be illegal, and yet not being criminal or fraudulent, they will not be barratrous. *Ibid* 61.

BILLS OF EXCHANGE.

1. If a bill of exchange be taken in payment, as a discharge of a pre-existent debt, or in such manner as imports an intention of the creditor to take the risk of the bill on himself, the original debt is thereby discharged. *Brown vs. Jackson*, 24.
2. If a bill of exchange is remitted, with a special endorsement, in payment of a previous debt which it was meant to discharge, the special endorsement does not restrain the rights of the endorsee on the drawer or on any previous endorser; whatever may be the effect of such endorsement between the creditor and his endorser. What will be the notice of non-payment of a bill of exchange. *Ibid*, 24.
3. The holder of a bill of exchange protested for non-payment, is not obliged to sue any one of the parties of the bill, in order to strengthen his claim on other parties. He may sue or not, as he chooses. *Ibid* 24.
4. In an action by the endorser of a bill of exchange, against the drawer, it is sufficient to aver that for the non-production of the bill, that it was lodged with the Commissioners of Bankruptcy, under a commission issued against the drawer, and still remains with them. *The Assignee of Palmer vs. The Assignee of Bright*, 96.

BOTTOMRY BONDS.

- captain having had a power of attorney from the owner of the vessel to borrow money upon the vessel, such a contract, if made by the captain, may create a lien on the vessel, in a Court of Common Law. *Henry vs. The Designers of Henry*, 145.
2. The master of a vessel has no power to enter into a charter party in a foreign port, for the purpose of giving the creditor of the owner of the vessel a security for the debt due to him. *Hick* 145.

CHANCERY.

1. Where a conveyance had been made of her real estate by a daughter to her father, immediately before her marriage, under a belief that she would be benefited by the same, and that the property conveyed by the deed would become hers after the decease of her parent; and where the operation of the conveyance was to deprive the daughter of the estate, the Court decreed a reconveyance of the property, and an account of the proceeds of the part which had been sold, so as to affect the justice of the case; and to give to the daughter the property to which she would have been entitled, had not the conveyance been made. *Sticum & Wife vs. Marshall et al.* 397.
2. Where the equity of each party is equal, the Court will not deprive one party of the advantage he may have gained by obtaining a legal estate in property, which was promised as a security for a debt due to him. *Philips et al. vs. Orammond et al.* 441.

CHANCERY PRACTICE.

1. Sparks & Lloyd being indebted to Johnson & Smith, assigned a mortgage to them in payment, it being understood that the assignors were not to be answerable for the title of the mortgagor to the mortgaged premises. Smith died, leaving Johnson his surviving partner, who became bankrupt, and the plaintiffs his assignees. They filed a bill, stating that the mortgagor had no title to the mortgaged premises, and that he was a bankrupt, which was known to the assignors, and concealed at the time of the assignment. Upon a demurrer to a bill, every part of it must be taken as true. *Pagan et al. vs. Sparks et al.* 325.
2. The complainants are the proper persons to ask the relief sought for by the bill, which is to obtain payment of the original debt due by the defendants, notwithstanding the assignment of the mortgage. *Ibid.* 325.
3. The representatives of a deceased partner need not be made parties to a bill filed by the surviving partner, as they have no claim

CONSTRUCTION OF STATUTES.

to have been imported into Philadelphia, of which entry was made, and that the goods were not invoiced according to their actual cost at Liverpool, the place of their exportation, with a design to avoid the payment of the duties, or part of them; that the goods were of greater value than the amount of the invoice; and that the defendant was the person making the entry, contrary to the form of the Act of Congress, &c.

The offence, under the Act of Congress, consists in the making of an entry upon an invoice, below the actual cost of the goods, with design to evade the duties. No matter how fraudulent the invoice may be, still, if the entry is made according to the actual cost, the person making it is guilty of no offence. The law requires that the goods shall be entered at the market value at the place of exportation, deducting charges. *Goodwill vs. The United States*, 492.

6. The declaration imputes to the consignee the offence of the exporter, and makes him liable for it, although the fraudulent intention is imputed by the declaration to the person making the invoice, and not to him who made the entry, and is prosecuted for the fraud. *Ibid.* 492.

7. Jurisdiction, 7.

CONTINUANCE.

1. The Court continued the cause, on the application of the defendant, a witness being absent in New-Jersey; on the ground, that a state magistrate cannot issue process, for defendant's witnesses, into another state. *The United States vs. Little*, 169.
2. The Court continued the cause, upon the application of the defendant, he being an administrator, and having a few days before discovered among the intestate's papers, material testimony. *Hougen vs. Gérard, Administrator*, 164.

CONTRACTS.

1. The mere settlement of an account between parties, one of them being represented by an agent, does not make a contract between the parties, although it may be evidence of a contract. *Peterson vs. The United States*, 36.
2. Insurance, 5, 14, 15.
3. Revenue Laws, 5.
4. Every valid contract must have a subject matter to operate upon. If insurance has been made on cargo, there must have been such a cargo, and the risk insured must have commenced. *Stiles vs. The Insurance Company of North America*, 107.

CONTRACTS.

5. A memorandum embodied on a policy, if there never was a subject upon which the policy acted, will not constitute a contract. *Ibid.* 107.
6. No precise form of words is required to raise up a contract of insurance; and if the words used express it, with the intention of the parties, it will be sufficient. *Ibid.* 107.
7. It is a general principle of law, that where a contract is lawful when made, and afterwards renders performance of it unlawful, neither party to the contract shall be prejudiced, but the contract is to be considered at an end. *Union. The Insurance Company of Philadelphia*, 312.
8. If a law forbid the performance of a contract in part only, he who is bound by it, must still perform what he lawfully may. *Ibid.* 312.

COSTS.

The plaintiff having recovered at law, the Court directed the costs of the bill of discovery, by which the plaintiffs at law were prevented recovering, should be paid by the defendants in the bill, they being plaintiffs at law. *Lessee of Rouse vs. Brown et al.* 271.

COURTS.

1. Upon a special verdict, the Court has only to decide the law upon the facts stated, where a difficulty is expressed by the jury upon the facts. But if the jury express a doubt as to a particular point of law, the Court can only decide the law upon that point. *Peterson vs. The United States*, 36.

2. B. pledged a vessel to P. to secure a sum of money loaned, and she was afterwards attached by another creditor of B. in the state of Delaware, and there sold under legal proceedings, P. becoming the purchaser; and after repairing her at some cost, he brought her to Philadelphia, where the plaintiff instituted this action of trover, for her recovery. *Banker vs. Parkhurst*, 142.

Held, that the regularity of the proceedings in Delaware, under which the vessel was sold, cannot be inquired into in this issue. *Ibid.* 142.

3. When the jury assume the right to draw conclusions, which are exclusively the province of the Court, they will be disregarded. *King vs. The Delaware Insurance Company*, 300.

4. It is a power which belongs essentially to every Court, to superintend the conduct of its officers, to see by what authority they act, and that its process shall not be vexatiously employed. *The King of Spain vs. Oliver*, 429.

5. The Orphans' Court, established by the laws of Pennsylvania, has a

COURTS.

general jurisdiction, as to intestate estates, and to direct a sale of real property for payment of debts; and it is not competent for this Court to examine the order of that Court, whilst it remains in force. *Leaves of Allen vs. Lyons*, 475.

6. The jury, after forty-eight years since the order of the Orphans' Court, and a conveyance under it, without any pretence of an opposing title in all that time, may presume one dead, intestate, and without issue, alleged to have been so at the time of the proceedings of the Court. *Ibid.* 475.

7. The schooner *Fortitude*, owned by the appellants, citizens of the United States, and merchants resident at New-London, on her return voyage from Martinico, a British island, having on board part of her outward cargo, and the remaining portion of her loading having been shipped at Martinico, was captured as prize by a French privateer, carried to St. Martins, where the vessel and cargo were sold by order of the governor, and part of the latter sent by the purchaser to the appellants in Philadelphia. The *Fortitude* and cargo were afterwards condemned by a French Court of Prize, sitting at Guadaloupe, for an asserted violation of the Milan Decree, in trading with a British colony.

The sentence of a Court of exclusive jurisdiction, operating directly on the thing itself, is conclusive between the same parties, upon the same matter coming in any manner before another Court of co-ordinate jurisdiction, not only of the right which it establishes, but of the fact which it has decided. *Armroyd et al. vs. Williams et al.* 508.

8. So long as the decree of a Court of Admiralty, foreign or domestic, remains in force, unreversed, it is conclusive to change the property upon which it operates; and the interference of another Court of co-ordinate jurisdiction, is not authorized, whether the decree is erroneous or not. The sentence of such a Court is not examinable at all, in another Court. *Ibid.* 508.

COURTS OF THE UNITED STATES.

1. The Constitution of the United States gives jurisdiction to the Courts of the United States, in cases where foreign states are parties; and the Judicial Act gives to the Circuit Court, jurisdiction in all cases between aliens and citizens. *The King of Spain vs. Oliver*, 429.

2. *King of Spain*, 1.

3. Jurisdiction, 2, 3, 4.

4. Whatever may be done by foreign tribunals, in reference to the es-

COURTS OF THE UNITED STATES.

established principles of the law of nations, relative to the consistency of the treatment of foreign Prize Courts, the Courts of the United States will not, for purposes of retaliation, depart from the fixed principles of the law of nations, which declare that they are consistent. *Armory et al. vs. Williams et al* 503.

DAMAGES.

1. Agent and Factor, 2, 3, 4, 5.
2. Sale of property, 1.

DEL CREDERE.

1. The defendants sold goods consigned to them by the plaintiff, under a *del credere* commission, and received in payment, for part of the sales, the bills of exchange of W. They were authorized by the plaintiff to remit in bills, and with the other proceeds of sales, they purchased a bill drawn by I. Both bills were protested. *Muller vs. Bohlen*, 378.
2. The Court held the defendants liable for W.'s bill, it having been received in payment for a debt guaranteed by them, but not for the bill drawn by I, which was remitted according to order. *Ibid*. 378.

DEPOSITIONS.

Evidence, 6, 15, 16.

DEVIATION.

1. What will constitute a deviation on a voyage insured. To go out of her course to save the life of a man, will not be considered a deviation. *Bond vs. The Brig Cora*, 80.
2. Insurance on the Jefferson, at and from St. Lucia to New-York, with liberty to touch and trade at St. Kitts. The vessel, having lost some of her men at St. Lucia, went into St. Bartholomew to supply the loss, and sustained an injury on her return voyage, she being run foul of by another vessel, the damages from which exceeded fifty per cent. The underwriters claimed to be discharged, on the ground of deviation, and sailing from St. Lucia without being sufficiently manned, which was unseaworthiness. *Cruder vs. The Philadelphia Insurance Company*, 262.
3. If the accident happen whilst the property is at the risk of the underwriters, and cannot be repaired at the port of departure, the vessel may go to the nearest port for the purpose, and she continues in the same situation as to the insurance, as if she had been repaired at the port of departure. The insured are bound to prove, that it

DEVIATION.

- was necessary to proceed to another port, and that the vessel went to the nearest port, at which her wants could be supplied. *Ibid* 262.
4. The smallest deviation from the usual course of the voyage, without a justifiable necessity, discharges the underwriters, although the loss was not the immediate consequence of the deviation. *Martin vs. The Delaware Insurance Company*, 254.
 5. It is not an excuse for a deviation, that there was a sufficient number of hands to navigate the vessel to a port, where the necessary addition to the crew could be obtained for the whole voyage; such port not being in the course of the voyage, and the want of hands existing before the commencement of the voyage insured. The vessel should be fitted for the voyage insured, at the time of her departure. *Credgers vs. The Pennsylvania Insurance Company*, 339.

DEVISE.

1. Bankrupt and Bankruptcy, 2, 3, 4, 5, 6.
2. T. P., by his will, gave all the annual income of his estate to his wife, during her widowhood, to be equally divided between her and his son, with instructions to educate his son; but if it should so happen, that his wife should change her condition, then he gave the direction of his son's education to T. S. He afterwards devised a part of his real estate to his son, specifically. At the time of the decease of T. P., he left his wife, who afterwards married, his son, and a granddaughter, the child of a deceased son. *Lessee of Pryor vs. Dunkle et al* 416.
3. The Court held, that T. P. died intestate as to all the estate not specifically devised to his son, the widow having no interest in it after the termination of her widowhood; and that his granddaughter was entitled to a moiety thereof. *Ibid* 416.

DURESS.

When a party has been discharged by the insolvent law of Pennsylvania, and a suit is afterwards brought against him in the state of Delaware for a debt due before his discharge, the arrest in Delaware was lawful, and the plea of duress against an instrument given by the defendant, who was in confinement, will not be received; although it would have been otherwise, if the arrest had taken place in Pennsylvania. *Latapoe vs. Pecholier*, 180.

EJECTMENT.

1. A purchaser at a sheriff's sale, under a judgment for the lien, entered according to the law of Pennsylvania, of the equitable ownership, cannot maintain ejectment against the proprietor of the lot

EJECTMENT.

- of ground on which the building stands. *Case of Leary vs. Boudinot*, 32.
2. A warrant, and survey, and consideration money paid, is sufficient title to maintain an ejectment in this Court; but no proof of payment appearing, the plaintiff was nonsuited. *Lease of Copley vs. Biddle*, 354.
3. In an ejectment against any other person than the proprietor, or one claiming under him, it is not necessary to prove the title out of the proprietaries of Pennsylvania, if a right of entry is proved. *Lease of Allen vs. Lyons*, 478.
4. An ejectment cannot be maintained on a warrant, without a survey, or purchase money paid. *Lease of Pankrat vs. Chaslett*, 160.
5. The plaintiff claimed under a warrant and survey in 1769; but produced no proof of the payment of the purchase money to the proprietors or to the state. Such a title is not sufficient to recover in ejectment, as it does not give a right of entry. *Lease of Milligan vs. Dickson et al.* 258.

EMBARGO AND EMBARGO LAWS.

1. Information against the brig Agnes, a coasting vessel, for breach of the embargo laws, she having proceeded from the United States, in December 1808, to St. Bartholomew's, where she was sold to the appellant, and afterwards returned to Philadelphia with a cargo. A forfeiture of the vessel, imposed by the embargo laws, cannot be enforced after she has arrived within the jurisdiction of a foreign power; but the United States must then resort to the penalties imposed by those laws, and proceed for double the value of the vessel and cargo, to which they are entitled, upon their violation. *Parish vs. The United States*, 361.
2. Action on a bond, executed according to the provisions of the embargo laws, with condition to reland a cargo laden at Philadelphia, at Portland, the dangers of the seas excepted. The vessel was driven, by stress of weather, from the coast, and put into Porto Rico, where she was ordered by the governor to unload and sell her cargo. The cargo was sold at Porto Rico, and the vessel, after being repaired, returned to the United States. *The United States vs. Hall*, 366.
3. Perils of the sea, 1, 2.

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EQUITY.

the defendant, but that he can prove the mistakes of the arbitrators. *Hurst vs. Hurst*, 127.

2. Release, 1.

EVIDENCE.

1. Where a warrant of survey was issued, and a report made thereon, that the vessel was unfit to perform the voyage, and the vessel and cargo were ordered to be sold; the captain cannot be admitted as a witness to prove the condition of the vessel at the time of the survey, and that she was unfit for the voyage. The proceeding was judicial, and the warrant and report must be produced; but the facts contained in the report may be proved by other evidence. *Robinson vs. Clifford*, 1.
2. A certificate of the Registrar of the Vice-Admiralty Court was produced, which stated that the warrant was lost. The certificate is not evidence, but the fact of the loss must be proved under a commission. *Ibid.* 1.
3. Written statutes and edicts of foreign countries must be produced; common or unwritten laws may be proved by parol. *Ibid.* 1.
4. Evidence of a usage to explain some clause in the contract of insurance, is regular; but it can only be resorted to when the law is unsettled, and then the construction must be determined by the usage, and not by the opinions of witnesses. *Winthrop vs. Union Insurance Company*, 7.
5. Depositions taken under a commission, issued to a place where the commissioners are prohibited executing the commission, taken according to the law of the place, in the presence of the commissioners, by the Judge, may be read in evidence. If all the interrogatories, either in form or substance, are not put to the witnesses, the evidence cannot be read. *Ibid.* 7.
6. It is no objection to reading a deposition taken abroad, that the witnesses had previously been examined and cross-examined under a commission in the United States. *Ibid.* 7.
7. The protest of some of the crew, taken at the Isle of France, was permitted to be read, to invalidate their evidence under a commission. *Ibid.* 7.
8. Usage, 2.
9. In the incipient stage of a prosecution, the Judge may examine witnesses for the defendant, who were present at the time the offence is charged to have been committed, for the purpose of explaining the testimony of the witnesses for the United States;

EVIDENCE.

- add the same to the prosecution may be cross-examined. *The United States vs. White*, 29.
10. Witnesses for the defendant are never sent to the grand jury, but by the consent of the prosecuting. *Ibid.* 29.
11. The declarations of an agent for the defendant, by whose orders the plaintiffs had made insurance for the benefit of the defendant, were not admitted to prove the liability of the defendant for the premium. *Millett et al. vs. Anderson*, 31.
12. The policy of insurance, without other proof of the payment of the premium, is not evidence of its payment. *Ibid.* 31.
13. Contracts, 1.
14. If, in an account settled between parties, an interest in a vessel is debited to one of them, the charge might be evidence to satisfy a jury of the fact of a sale and transfer of the vessel; but it is not in itself a transfer, and the Court, if the debt on such account and debit is proved, cannot say there was a transfer of a vessel. *Peterson vs. The United States*, 34.
15. A commission, which had been executed and returned, was set aside, because it had been opened by one of the officers of the government, before it came into the hands of the clerk. *The United States vs. Price's Administrators*, 356.
16. In an action for the recovery of a debt, said to be due by the defendant, as the dormant partner of B. & A., a person who is a creditor of the partnership, is not a competent witness to prove the defendant a dormant partner in the firm indebted to him. *Coyne vs. Robinson et al.* 388.
17. There is no objection to the examination of the head clerk of one of the parties, for he has no privileges like those of an attorney. *Ibid.* 388.
18. Where accounts have, on notice from the plaintiff to the defendant to produce them, been delivered to the plaintiff, and retained by him, and without objection, the defendant may insist on their being read on the trial of the cause. *Ibid.* 388.
19. The acknowledgment of a debt by one partner, will bind another partner, after the partnership is proved; but it is not sufficient or proper to be given in evidence to prove a partnership. *Ibid.* 388.
20. The confession of the party in his answer to a bill, or in writing under his hand, that the money laid out belonged to the person, is sufficient evidence thereof. *Philips et al. vs. Crammond et al.* 441.
21. The copy of a record of the condemnation of the property insured, was offered in evidence without the seal of the officer who made

EVIDENCE.

- out the copy; but there were on the margin of each page, flourishes with the pen. No proof was given, that the officer had or had not a seal. The Court rejected the evidence. *Talcott vs. The Delaware Insurance Company*, 449.
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 55. Parol evidence was admitted, to prove the period when a person was considered by the government of the United States as a minister. *Ibid.* 205.
 56. The sentence of a foreign Court of Admiralty being full, and showing the ground of condemnation, no other part of the record need be produced. *Hourquie et al. vs. Stephen Girard, Adm.* 212.
 57. A record of a judgment obtained by the plaintiff in North Carolina, against James Reed, administrator *de bonis non* of Bartow, was properly given in evidence to the jury; parol evidence having proved that the defendant, Joseph Reed, had attended the taking of depositions in the case, while depending in the Court of North Carolina, and that notice of this suit was given to him. *Stevens vs. Reed*, 274.
 58. The rule of law is, that a judgment is inadmissible in evidence, except between the same parties, or those in privity with them, and for the same cause of action. *Ibid.* 274.
 59. To prove the rate of interest allowed in any one of the states of the United States, the law of the state must be produced. *Jaffray vs. Dennis*, 283.

EXCHANGE.

Exchange should be calculated according to the rate prevailing at the time of the trial. *Smith vs. The Administratrix of Shaw*, 167.

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general jurisdiction, as to intestate estates, and to direct a sale of real property for payment of debts; and it is not competent for this Court to examine the order of that Court, whilst it remains in force; *Loose of Allen vs. Lyons*, 475.

6. The jury, after forty-eight years since the order of the Orphans' Court, and a conveyance under it, without any pretence of an opposing title in all that time, may presume one dead, intestate, and without issue, alleged to have been so at the time of the proceedings of the Court. *Ibid.* 475.

7. The schooner Fortitude, owned by the appellees, citizens of the United States, and merchants resident at New-London, on her return voyage from Martinico, a British island, having on board part of her outward cargo, and the remaining portion of her loading having been shipped at Martinico, was captured as prize by a French privateer, carried to St. Martins, where the vessel and cargo were sold by order of the governor, and part of the latter sent by the purchaser to the appellants in Philadelphia. The Fortitude and cargo were afterwards condemned by a French Court of Prize, sitting at Guadaloupe, for an asserted violation of the Milan Decree, in trading with a British colony.

The sentence of a Court of exclusive jurisdiction, operating directly on the thing itself, is conclusive between the same parties, upon the same matter coming in any manner before another Court of co-ordinate jurisdiction, not only of the right which it establishes, but of the fact which it has decided. *Armroyd et al. vs. Williams et al.* 508.

8. So long as the decree of a Court of Admiralty, foreign or domestic, remains in force, unreversed, it is conclusive to change the property upon which it operates; and the interference of another Court of co-ordinate jurisdiction, is not authorized, whether the decree is erroneous or not. The sentence of such a Court is not examinable at all, in another Court. *Ibid.* 508.

COURTS OF THE UNITED STATES.

1. The Constitution of the United States gives jurisdiction to the Courts of the United States, in cases where foreign states are parties; and the Judicial Act gives to the Circuit Court, jurisdiction in all cases between aliens and citizens. *The King of Spain vs. Oliver*, 429.

2. *King of Spain*, 1:

3. Jurisdiction, 2, 3, 4.

4. Whatever may be done by foreign tribunals, in reference to the es-

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COURTS OF THE UNITED STATES.

established principles of the law of nations, relative to the conclusiveness of judgments of foreign Prize Courts, the Courts of the United States will not, for purposes of retaliation, depart from the fixed principles of the law of nations, which declare that they are conclusive. *Armory et al. vs. Williams et al.* 503.

DAMAGES.

As Agent and Factor, 2, 3, 4, 5.

2. Sale of property, 1.

DEL CREDERE.

1. The defendants sold goods consigned to them by the plaintiff, under a *del credere* commission, and received in payment, for part of the sales, the bills of exchange of W. They were authorized by the plaintiff to remit in bills, and with the other proceeds of sales, they purchased a bill drawn by I. Both bills were protested. *Muller vs. Bohlen*, 378.
2. The Court held the defendants liable for W.'s bill, it having been received in payment for a debt guaranteed by them, but not for the bill drawn by I, which was remitted according to order. *Ibid.* 378.

DEPOSITIONS.

Evidence, 6, 15, 16.

DEVIATION.

1. What will constitute a deviation on a voyage insured. To go out of her course to save the life of a man, will not be considered a deviation. *Bond vs. The Brig Cora*, 80.
2. Insurance on the *Jefferson*, at and from St. Lucia to New-York, with liberty to touch and trade at *St. Kitt's*. The vessel, having lost some of her men at St. Lucia, went into *St. Bartholomew's* to supply the loss, and sustained an injury on her return voyage, she being run foul of by another vessel, the damages from which exceeded fifty per cent. The underwriters claimed to be discharged, on the ground of deviation, and sailing from St. Lucia without being sufficiently manned, which was unseaworthiness. *Cruder vs. The Philadelphia Insurance Company*, 262.
3. If the accident happen whilst the property is at the risk of the underwriters, and cannot be repaired at the port of departure, the vessel may go to the nearest port for the purpose; and she continues in the same situation as to the insurance, as if she had been repaired at the port of departure. The insured are bound to prove, that it

DEVIATION.

- was necessary to proceed to another port, and that the vessel went to the nearest port, at which her wants could be supplied. *Ibid.* 262.
4. The smallest deviation from the usual course of the voyage, without a justifiable necessity, discharges the underwriters, although the loss was not the immediate consequence of the deviation. *Martin vs. The Delaware Insurance Company*, 254.
 5. It is not an excuse for a deviation, that there was a sufficient number of hands to navigate the vessel to a port, where the necessary addition to the crew could be obtained for the whole voyage; such port not being in the course of the voyage, and the want of hands existing before the commencement of the voyage insured. The vessel should be fitted for the voyage insured, at the time of her departure. *Crocker vs. The Pennsylvania Insurance Company*, 339.

DEVISE.

1. Bankrupt and Bankruptcy, 2, 3, 4, 5, 6.
2. T. P., by his will, gave all the annual income of his estate to his wife, during her widowhood, to be equally divided between her and his son, with instructions to educate his son; but if it should so happen, that his wife should change her condition, then he gave the direction of his son's education to T. S. He afterwards devised a part of his real estate to his son, specifically. At the time of the decease of T. P., he left his wife, who afterwards married, his son, and a granddaughter, the child of a deceased son. *Lessee of Pryor vs. Dunkle et al.* 416.
3. The Court held, that T. P. died intestate as to all the estate not specifically devised to his son, the widow having no interest in it after the termination of her widowhood; and that his granddaughter was entitled to a moiety thereof. *Ibid.* 416.

DURESS.

- When a party has been discharged by the insolvent law of Pennsylvania, and a suit is afterwards brought against him in the state of Delaware for a debt due before his discharge, the arrest in Delaware was lawful, and the plea of duress against an instrument given by the defendant, who was in confinement, will not be received; although it would have been otherwise, if the arrest had taken place in Pennsylvania. *Lalopoe vs. Pecholier*, 180.

EJECTMENT.

1. A purchaser at a sheriff's sale, under a judgment for the lien, entered according to the law of Pennsylvania, of the equitable ownership, cannot maintain ejectment against the proprietor of the lot

EJECTMENT.

- of ground on which the building stands. *Garrett's Lease vs. Boudinot*, 32.
2. A warrant, survey, and consideration money paid, is sufficient title to maintain an ejectment in this Court; but no proof of payment appearing, the plaintiff was nonsuited. *Lease of Copley vs. Biddle*, 354.
3. In an ejectment against any other person than the proprietary, or one claiming under him, it is not necessary to prove the title out of the proprietaries of Pennsylvania, if a right of entry is proved. *Lease of Allen vs. Lyons*, 473.
4. An ejectment cannot be maintained on a warrant, without a survey, or purchase money paid. *Lease of Pinkert vs. Chaslett*, 160.
5. The plaintiff claimed under a warrant and survey in 1769; but produced no proof of the payment of the purchase money to the proprietors or to the state. Such a title is not sufficient to recover in ejectment, as it does not give a right of entry. *Lease of Milligan vs. Dixon et al.* 253.

EMBARGO AND EMBARGO LAWS.

1. Information against the brig Agnes, a coasting vessel, for breach of the embargo laws, she having proceeded from the United States, in December 1808, to St. Bartholomew's, where she was sold to the appellant, and afterwards returned to Philadelphia with a cargo. A forfeiture of the vessel, imposed by the embargo laws, cannot be enforced after she has arrived within the jurisdiction of a foreign power; but the United States must then resort to the penalties imposed by those laws, and proceed for double the value of the vessel and cargo, to which they are entitled, upon their violation. *Parker vs. The United States*, 361.
2. Action on a bond, executed according to the provisions of the embargo laws, with condition to reland a cargo laden at Philadelphia, at Portland, the dangers of the sea excepted. The vessel was driven, by stress of weather, from the coast, and put into Porto Rico, where she was ordered by the governor to unload and sell her cargo. The cargo was sold at Porto Rico, and the vessel, after being repaired, returned to the United States. *The United States vs. Hall*, 366.
3. Perils of the sea, 1, 2.

EQUITY.

1. The bill cannot be supported as a bill of discovery, if the plaintiff does not state that he relies on the discovery to be obtained for

EQUITY.

the defendant, but that he can prove the substance of the arbitrators. *Hurst vs. Hurst*, 127.

2. Release, 1.

EVIDENCE.

1. Where a warrant of survey was issued, and a report made thereon, that the vessel was unfit to perform the voyage, and the vessel and cargo were ordered to be sold; the captain cannot be admitted as a witness to prove the condition of the vessel at the time of the survey, and that she was unfit for the voyage. The proceeding was judicial, and the warrant and report must be produced; but the facts stated in the report may be proved by other evidence. *Robinson vs. Clifford*, 1.
2. A certificate of the Registrar of the Vice-Admiralty Court was produced, which stated that the warrant was lost. The certificate is not evidence, but the fact of the loss must be proved under a commission. *Ibid.* 1.
3. Written statutes and edicts of foreign countries must be produced; common or unwritten laws may be proved by parol. *Ibid.* 1.
4. Evidence of a usage to explain some clause in the contract of insurance, is regular; but it can only be resorted to when the law is unsettled, and then the construction must be determined by the usage, and not by the opinions of witnesses. *Winthrop vs. Union Insurance Company*, 7.
5. Depositions taken under a commission, issued to a place where the commissioners are prohibited executing the commission, taken according to the law of the place, in the presence of the commissioners, by the Judge, may be read in evidence. If all the interrogatories, either in form or substance, are not put to the witnesses, the evidence cannot be read. *Ibid.* 7.
6. It is no objection to reading a deposition taken abroad, that the witnesses had previously been examined and cross-examined under a commission in the United States. *Ibid.* 7.
7. The protest of some of the crew, taken at the Isle of France, was permitted to be read, to invalidate their evidence under a commission. *Ibid.* 7.
8. Usage, 2.
9. In the incipient stage of a prosecution, the Judge may examine witnesses for the defendant, who were present at the time the offence is charged to have been committed, for the purpose of explaining the testimony of the witnesses for the United States;

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- and the statements for the prosecution may be cross-examined. *The United States vs. Wells*, 290.
20. Witnesses for the defendant are never sent to the grand jury, but by the consent of the prosecution. *Ibid.* 29.
21. The depositions of an agent for the defendant, by whose officers the plaintiffs had made insurance for the benefit of the defendant, were not admitted to prove the liability of the defendant for the premium. *Mitchell et al. vs. Watson*, 31.
22. The policy of insurance, without other proof of the payment of the premium, is not evidence of its payment. *Ibid.* 31.
23. Contracts, 1.
24. If, in an account settled between parties, an interest in a vessel is debited to one of them, the charge might be evidence to satisfy a jury of the fact of a sale and transfer of the vessel; but it is not in itself a transfer; and the Court, if the facts of such account and debit is proved, cannot say there was a transfer of a vessel. *Peterson vs. The United States*, 36.
25. A commission, which had been executed and returned, was set aside, because it had been opened by one of the officers of the government, before it came into the hands of the clerk. *The United States vs. Price's Administrators*, 356.
26. In an action for the recovery of a debt, said to be due by the defendant, as the dormant partner of B. & A., a person who is a creditor of the partnership, is not a competent witness to prove the defendant a dormant partner in the firm indebted to him. *Coyne vs. Robinson et al.* 388.
27. There is no objection to the examination of the head clerk of one of the parties, for he has no privileges like those of an attorney. *Ibid.* 388.
28. Where accounts have, on notice from the plaintiff to the defendant to produce them, been delivered to the plaintiff, and retained by him, and without objection, the defendant may insist on their being read on the trial of the cause. *Ibid.* 388.
29. The acknowledgment of a debt by one partner, will bind another partner, after the partnership is proved; but it is not sufficient or proper to be given in evidence to prove a partnership. *Ibid.* 388.
30. The confession of the party in his answer to a bill, or in writing under his hand, that the money laid out belonged to the person, is sufficient evidence thereof. *Philips et al. vs. Crammond et al.* 441.
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 55. Parol evidence was admitted, to prove the period when a person was considered by the government of the United States as a minister. *Ibid.* 205.
 56. The sentence of a foreign Court of Admiralty being full, and showing the ground of condemnation, no other part of the record need be produced. *Hourquebie et al. vs. Stephen Girard, Adm.* 212.
 57. A record of a judgment obtained by the plaintiff in North Carolina, against James Reed, administrator *de bonis non* of Bartow, was properly given in evidence to the jury; parol evidence having proved that the defendant, Joseph Reed, had attended the taking of depositions in the case, while depending in the Court of North Carolina, and that notice of this suit was given to him. *Stavelis vs. Reed*, 274.
 58. The rule of law is, that a judgment is inadmissible in evidence, except between the same parties, or those in privity with them, and for the same cause of action. *Ibid.* 274.
 59. To prove the rate of interest allowed in any one of the states of the United States, the law of the state must be produced. *Jaffray vs. Dennis*, 283.

EXCHANGE.

Exchange should be calculated according to the rate prevailing at the time of the trial. *Smith vs. The Administratrix of Shaw*, 167.

EXECUTIONS.

Notice, 1.

EX POST FACTO LAWS.

An *ex post facto* law is one which, in its operation, makes that criminal or penal, which was not so at the time when the action was performed; or which increases the punishment; or which, in relation to the offence or its consequences, alters the situation of a party, to his disadvantage. *The United States vs. Haly* 366.

FACTOR.

Licn, 3.

FOREIGN ATTACHMENT.

1. On the 14th of September 1807, a foreign attachment was laid on the property of L., in the hands of the defendant. On the 19th of September, the defendant received goods belonging to L., who, at that time, was under acceptances of bills endorsed by L., and which, on their protest for non-payment by L., the defendant paid. The attachment entitled the plaintiff to the proceeds of the goods in the hands of the defendant, notwithstanding his liability for, and subsequent payment of the bills endorsed by him. *Taylor vs. Gardner*, 488.

2. The plaintiff issued a foreign attachment against the defendant, a merchant of Canton, for the recovery of damages, to the amount of four thousand five hundred dollars, upon a promise made by him, for a valuable consideration, to deliver to the plaintiff a quantity of tea of a certain quality, which promise he had not complied with, but had broken.

The law of Pennsylvania, of 1705, has received a liberal construction in the Courts of the state, so as to extend its remedies to debts contracted in foreign countries, by persons who never resided in the state. The law is remedial, and ought to be so construed as to remove the mischief which is spoken of. *Fisher vs. Consequa*, 382.

3. To constitute such a debt as may be pursued by a foreign attachment, under the law of Pennsylvania, the demand must arise under a contract, without which no debt can be created; and the measure of the damages must be such as the plaintiff can aver, by affidavit, to be due, without which special bail cannot regularly be demanded. *Ibid.* 382.

4. The remedy by foreign attachment will not lie for demands which arise *ex delicto*, or where special bail cannot regularly be required. *Ibid.* 382.

FOREIGN ATTACHMENT.

5. The promise of the defendant to deliver tons of a particular quality, was not complied with, and the plaintiff swears that the difference between the tons promised and those delivered, amounted to a particular sum, a foreign attachment lies. *Ibid.* 380.
6. It is no ground for dismissing a foreign attachment instituted in this Court, that the plaintiff had served out another attachment against the defendant in a state Court, and afterwards discontinued it. *Ibid.* 382.

FOREIGN LAWS.

1. Written statutes and edicts of foreign countries must be produced; common or unwritten laws may be proved by parol. *Robinson vs. Clifford*, 1.
2. Insurance on goods on board the *Concord*, at and from her port or ports, place and places of loading in Honduras, to Liverpool, warranted free from loss in consequence of, or detention on account of, any illicit or prohibited trade. The vessel was captured in the Bay of Honduras, by a British vessel, as prize; on the allegation that she was taking on board mahogany of larger dimensions than was allowed to American vessels; and while on her passage to Jamaica, she, with the capturing vessel, was lost.
Privileges given to vessels to cut mahogany, under the treaties between Spain and England, of 1762 and 1783. What is the proper construction of those treaties, and of the proclamations and laws relative to the trade under them, which have been issued or ordained by the English government. *Graham vs. The Pennsylvania Insurance Company*, 113.
3. The laws of a foreign country, where a contract is made, will be regarded by foreign tribunals as to the obligations of the contract, and as to its discharge. *Webster vs. Massey*, 157.

FOREIGN MINISTERS.

1. Indictment for an assault upon the *chargé d'affaires* of Russia, and for infracting the law of nations, by offering violence to the person of the said minister.

When the minister had a large party at his house, and a transparent painting at his window, at which a mob who had collected took offence, the defendant fired two pistols at the window, his intention being to destroy the painting, without doing injury to the person of the minister, or of any one. *The United States vs. Hand*, 435.

2. The law of nations identifies the *property* of the foreign minister, attached to his person, or in his use, with his *person*. To insult them, is an attack on the minister and his sovereign; and it ap-

FOREIGN MINISTERS.

seems to have been the intention of the Act of Congress, to punish offences of this kind. *Ibid.* 435.

3. To constitute an offence against a foreign minister, the defendant must have known that the house on which the attack was made was the dwelling of a minister; or otherwise, it is only an offence against the municipal laws of the state. *Ibid.* 435.

4. Public minister, 1.

FORFEITURE.

If a defendant has incurred a forfeiture, and seeks to avail himself of a defence granted to him by a subsequent law, to which he was not entitled at the time when the act for which the penalty is given, was performed; he must take it, subject to such terms and conditions, as the legislature, at the time it passed the beneficial law, or at any future time, might please to prescribe. *The United States vs. Hall*, 366.

FRAUD.

Release, 1.

FREIGHT.

Insurance, 57.

GRAND JURY.

Witnesses for the defendant are never sent to the grand jury, but by the consent of the prosecution. *The United States vs. White*, 29.

INDICTMENT.

Where an indictment for perjury did not state the day upon which the trial took place, and on which the defendant was sworn in the case in which the perjury was alleged to have been committed, the Court arrested the judgment. *The United States vs. Bowman*, 328.

INFORMATION.

Jurisdiction, 8, 9.

INJUNCTION.

An injunction was obtained to stay proceedings on a judgment rendered under the following circumstances. G. drew two bills of exchange in favour of M. on S., who accepted them for the accommodation of G., who afterwards became bankrupt, and obtained his certificate. S. made an assignment of certain effects to M. to

INJUNCTION.

secure his acceptance, and after the date of the certificate of S., arrested him in New-Jersey, and took from him the note upon which the judgment was obtained, which judgment was for the use of M. The Court refused to dissolve the injunction, as no money had been paid by S., but deemed the whole a contrivance to get rid of G.'s discharge under the bankrupt law. *Greenleaf vs. Mayer et al.* 44.

INSOLVENT AND INSOLVENCY.

1. The defendant had been discharged by the insolvent laws of Pennsylvania, of 1790 and 1798. The Court refused to enter an exoneretur on the bail-bond upon this ground. *Webster vs. Massey*, 157.
2. A discharge of the person under a foreign insolvent law, leaves the contract still in force; and whether bail shall be demanded or not, must depend on the laws of the country where the suit is brought. *Ibid.* 157.

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1. Evidence, 1, 2, 3.
2. If it appear that the terms of the order had been departed from in the policy of insurance, by fraud or mistake, the Court would consider the order as containing the contract between the parties; as where it materially varied from the policy; as if the risk stated in the policy be *from* such a place, instead of *at* and *from*; or if it contain a warranty not authorized by the order. In such cases, the variance itself, unless contradicted by proof, would be evidence of mistake. But in such cases, the order could only be resorted to so far as it varied from the policy, and in all other respects the policy would govern. *Delaware Insurance Co. vs. Hogan*, 4.
3. In an action on a policy of insurance on goods on board the ship Maryland, at and from New-York to the Cape of Good Hope, with liberty to proceed to, and trade at the Isle of France, and any other port or ports in the Indian seas, and at and from the ports she might go to, back to New-York; with liberty to touch and trade, as usual, on the outward and homeward voyages, for refreshments. The vessel touched at the Isle of France, thence to Trincomalee, proceeded to Madras and sold part of her cargo, and went from thence to Tranquebar, where she took in goods and proceeded to Batavia; there she sold the remains of her original cargo, as well as the goods taken in at Tranquebar, and sailed from Batavia with a cargo purchased with the proceeds of her outward cargo, and of the

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goods taken on board at Rotterdam. After leaving Batavia, all the officers died; and before his death, the captain directed one of the seamen, who was ignorant of navigation, to take the ship to the Isle of France, and deliver her to the consul. She arrived there, and was despatched for New-York, under the command of a British subject, but was lost on the voyage. It was held, that the trading was within the terms of the policy. That the proceeding to the Isle of France, was not a deviation. That the acts of the consul, if irregular, could not prejudice the rights of the insured. *Winthrop vs. Union Insurance Company*, 7.

4. The order for insurance on goods on board the Draper, directed it to be made *free of average under ten per cent.*, and the ship, on her arrival in the Texel, was subjected to charges and damages under ten per cent, in the nature of general average.

The original meaning of average, was a general contribution on ship, cargo, and freight, towards a loss sustaining for the benefit of all. At this time, such average is always called *general*. It is usual to add to the terms, *general, partial, or particular*, to designate the average intended. *Coster vs. The Phoenix Insurance Company*, 51.

5. Where the *written* clause in a policy is inconsistent with the *printed* parts of it, the former will be deemed and taken as the contract of the parties. *Ibid.* 51.

6. The vessel and cargo insured, were captured as prize, libelled and acquitted on the 7th of July; and on appeal by the captors, the sentence was affirmed on the 9th of July, and restitution was decreed; and on the 19th of July, restitution of the property captured was actually made, except of that which had been pillaged by the captors; but at what hour of the day the same was made, was submitted to the Court. On the same day, a survey was made to ascertain the amount of the spoiliations of the cargo, and on the 30th of July the vessel proceeded on her voyage.

On the 17th of July, (in New-York) the plaintiff received notice of the capture. On the 18th, he directed his agent in Philadelphia to abandon, who did so on the 19th, informing the plaintiff thereof by mail; the mail leaving Philadelphia for New-York, at twelve o'clock on the 19th of July.

The actual state of the loss, at the time of the abandonment, ought to decide the right of the assured to make the loss a total one; and it is on the reality of the loss at the time of the abandonment, its legality depends. *Marshall vs. The Delaware Insurance Company*, 54.

7. The right to abandon did not depend, in this case, on the question,

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whether the restitution was actually made, and the property in possession of the master of the vessel. The property was in the actual possession of the master, after the decree and warrant of restitution delivered to the master. *Ibid.* 54.

8. In case of capture and recapture, the property remains with the recaptors until salvage is paid. *Ibid.* 55.
9. Abandonment, 1.
10. The vessel insured was captured by the British, on the alleged ground that a war had been declared, or soon would be, between England and the United States. The crew was taken out by the captors, and the captain, mate, and a boy, left on board, the vessel being ordered to Halifax. The captain, apprehending the loss of all he had on board, and that he would be imprisoned, made an attempt to rescue the vessel, with the assistance of the mate and boy, which failed; and the *Romulus* was libelled and condemned at Halifax as lawful prize. A regular abandonment was made, and the loss was stated to have been by capture and barratry.

Where a regular abandonment is made, the property vests in the insurer by relation to the time of capture, but the captain continues the agent of the insured, until abandonment. His acts, subsequent to capture, may operate to the advantage, as well as to the disadvantage of the insurer; and the insured is protected in the clause in the policy, which binds the master to act after capture, only when it appears that he acted for the best for all concerned. The unlawful acts of the master are never to be sanctioned. The attempt to rescue the *Romulus* was unlawful, and furnished good ground of condemnation. *Dederer vs. The Delaware Insurance Company*, 61.

11. Deviation, 1.
12. A policy was underwritten by the Philadelphia Insurance Company, on goods on board the *Ann*, at and from Baltimore to Jeremie, and at and from thence to Baltimore, 12,000 dollars, valued. After the arrival of the *Ann* in the West Indies, the owner was informed, by a letter from the captain, that the return cargo would be 112,000 pounds of coffee; and insurance was made by the defendants, stating the cargo at 125,000 pounds of coffee, valued at twenty-two cents per pound, from which was to be deducted 12,000 dollars, insured in the Philadelphia Insurance Company. A total loss took place, and the Philadelphia Insurance Company paid the loss, by compromise, waiving an abandonment.

The policy underwritten by the Philadelphia Insurance Company, must
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be considered as ~~an~~ on the homestead cargo. *MP Kim vs. The Phoenix Insurance Company*, 89.

The policy underwritten by the defendants, does not bind them to cover the whole cargo, valued at twenty-two cents per pound, deducting the sum previously insured. *Ibid.* 89.

The defendants were not bound to resort to the insurance office in which the first policy was made, to ascertain the precise nature of the same. *Ibid.* 89.

By the policy made with the Philadelphia Insurance Company, the underwriters had, in case of loss, a right to as much of the cargo as would, at prime cost, amount to 12,000 dollars; and the second policy, in respect thereto, was void. *Ibid.* 89.

The waiver of an abandonment by the Philadelphia Insurance Company, did not affect the relations between the plaintiff and the defendants. *Ibid.* 89.

13. Contracts, 4, 5, 6.

14. Where parties to a contract of insurance, ignorant of the facts, made an agreement, by a memorandum on the policy, which was intended as an indulgence to the assured, the mistake will not prejudice either of them. *Scriba vs. The Insurance Company of North America*, 107.

15. If a vessel was not seaworthy when the risk insured commenced, and therefore neither party bound by the contract of the insurance, the premium, if paid, could not be retained. *Ibid.* 107.

16. Evidence, 20, 21.

17. Agent and Factor, 2, 3, 4, 5.

18. The condemnation of a vessel, upon a report of the surveyors, that many of her timbers were unsound and rotten, and that in her straitened and shattered condition, and from the want of proper docks at the place for repairing her, her repairs would cost more than she was worth; is not a condemnation, which will excuse the underwriters from liability under the clause in the policy, which declares, that if the vessel should be condemned, as unsound or rotten, the underwriters should not be liable. *Watson et al. vs. The Insurance Company of North America*, 152.

19. If the written and printed clauses of a policy of insurance can be made to stand together, and both be available, such an exposition of them should be adopted. *Seton vs. The Delaware Insurance Company*, 175.

20. A partial loss of an entire cargo, by sea damage, if amounting to more than fifty per cent., may, under circumstances, be converted into a technical total loss; but not if a distinct part of the cargo

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- be destroyed, and the voyage be not thereby broken up, or rendered unworthy of being prosecuted. *Ibid.* 173.
21. The plaintiffs effected insurance in New-York, on the Hope, from Gibraltar to New-York, for the amount of four thousand dollars, valuing her at that sum; and they afterwards effected insurance on her with the defendants, to the amount of four thousand dollars, valuing her at six thousand dollars; without notice to the defendants of the prior insurance. A partial loss occurred, and the plaintiffs claimed to charge a partial loss, upon the whole amount insured by the defendants in the second policy. *Murray et al. vs. The Insurance Company of Pennsylvania*, 186.
 22. The defendants are liable for as much of the agreed value of the Hope, as is not covered by the prior insurance, being to the extent of two thousand dollars. *Ibid.* 186.
 23. As the plaintiffs claim only a partial loss, the defendants are not entitled to an abandonment. *Ibid.* 186.
 24. It is not the incapacity of the assured to abandon, or his failure to do so, which can defeat his right to a recovery, unless he claims for a total loss. *Ibid.* 186.
 25. It was not necessary to give notice of the first insurance to the defendants. *Ibid.* 186.
 26. In case of a total loss, when two insurances have been made, the assured may abandon to the second underwriters, and take from them as much as the second policy covers. *Ibid.* 186.
 27. If one merchant is in the habit of effecting insurances for another, and neglects to have the same done when ordered, he is himself answerable for the loss as if he was the insurer, and he is entitled to the premium. *Morris vs. Summerl*, 203.
 28. Action on a policy of insurance, dated the 27th of June 1807, on goods on board the Little William, from Philadelphia to Tonnin-gen, or Hamburg, if not blockaded; warranted American property, proof to be made here. The captain was instructed, "If you can ascertain and obtain permission to go to Hamburg, from the cruising vessel at the entrance of the Eyder, you will proceed; but on no account attempt it, unless you are well assured that the blockade of the Elbe is raised." The vessel was captured by a British cruiser, six hundred miles from Tonnigen, and was condemned. The captain did not deliver his letter of instructions to the captors, until some days after he had delivered the ship's papers. The vessel and cargo were condemned by Sir William Scott, as enemy's property. *F. W. Sperry vs. The Delaware Insurance Company*, 243.

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29. The stipulation in the policy, as to the place where proof is to be made in support of the warranty, is not set aside by the sentence of a foreign Court against the neutrality, but the same may be vindicated here, notwithstanding such sentence. *Ibid.* 243.
30. The instructions of the owner, under which the master of a vessel, sailing to a port known to be blockaded, is directed to govern himself by information to be obtained at the mouth of the blockaded port, justify suspicions of an intention to violate the blockade; but these should cease, when it is manifest that the conduct of the captain was legal and fair. *Ibid.* 243.
31. If the instructions to the master violated any of the rules established in the Court of Admiralty of England, although such rules were against the laws of nations, the instructions should have been communicated to the underwriters. *Ibid.* 243.
32. The instructions of the plaintiff to the master, did not violate any of these rules, the vessel being destined to Tonnigen, unless she should obtain permission at the entrance of a place not blockaded, to proceed to Hamburg. *Ibid.* 243.
33. The conduct of the captain, in not delivering the letter of instructions when captured, was imprudent; but was not such as should affect the assured. *Ibid.* 243.
34. *Persian, 2, 3.*
35. It is a uniform rule, in estimating the loss upon a vessel which has never been heard of, and is therefore considered as lost, to calculate interest after twelve months and thirty days from the last period when the vessel was heard from. *Hallet et al. vs. The Phoenix Insurance Company, 279.*
36. The underwriters are bound to take notice of the course of trade; but it should appear that the course was so uniformly pursued, as that it should have been known to the underwriters, as well as to the insured. *Martin vs. The Delaware Insurance Company, 254.*
37. Insurance was made on the freight of the *Venus*, from Philadelphia to the Isle of France. On the voyage insured, the ship was stopped by a British ship of war, on the 16th of January 1808, detained for a short time, and discharged, her register being endorsed "warned not to proceed to any port in the possession of His Majesty's enemies." The *Venus* returned to Philadelphia on the 23d of February 1808, and the assured claimed for a total loss. The Isle of France was not blockaded by an actual force, until after the 1st of February 1808; but the captain of the British ship informed the master and owner of the *Venus*, that the Isle of France was blockaded, and that she would be prize; which caused the

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Venus to return to Philadelphia. *Kings v. The Delaware Insurance Company*, 300.

38. Under what circumstances the master of a ship will be justified in abandoning his voyage, from apprehensions of danger. *Ibid.* 300.
39. The actual existence of a blockading force, and only reasonable doubt prevailing that there is danger from it, does not justify a deviation from a voyage insured. *Ibid.* 300.
40. If the underwriter is to be rendered liable for a technical total loss, where none has really been sustained, the insured ought to do all in his power to prevent such loss, and he should proceed upon his voyage until the danger of an actual loss is rendered manifest. *Ibid.* 300.
41. The *Isle of France* not being in fact blockaded, there was not a legal or actual force to prevent the *Venus* proceeding there. *Ibid.* 300.
42. Information of the place to which a vessel is proceeding, being surrounded by hostile privateers, will not authorize the captain to break up his voyage, from an apprehension of danger, and thus make the underwriters liable. *Ibid.* 300.
43. An increase of risk after the voyage is begun, will not excuse the insured, beyond a prudent and necessary deviation in order to avoid it. Warning and endorsement of papers, do not amount to "an arrest, restraint, or detention." *Ibid.* 300.
44. The insurers on the freight of the *Venus* are not liable for the same, as the voyage was improperly broken up. *Ibid.* 300.
45. The insured must always state to the underwriters a sufficient reason for his offer to abandon; and if he does so, it is no objection that he does not state other reasons. *Ibid.* 300.
46. If the assured states an insufficient reason for abandoning, he cannot, at the trial, rely upon one not stated in the notice. *Ibid.* 300.
47. Insurance was effected, 21st December 1807, on the *Hazard*, to Havana. She cleared on the 21st of December, and sailed on the same day, but was detained by head winds, and was afterwards arrested in the bay of Delaware, and prevented from proceeding, under the embargo law, passed 22d December 1807, and promulgated at Philadelphia on the 24th December 1807; in consequence of which, she returned to port, and was abandoned by the plaintiff to the underwriters. The insured was held to be entitled to recover for a total loss. *Odlin vs. The Insurance Company of Pennsylvania*, 312.
48. Under the decisions in the English Courts, the embargoes laid by governments were considered as temporary restraints only, which

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did not avoid, but merely suspended the performance of contracts on charter parties, and for seamen's wages. *Ibid.* 312.

49. There is no good reason why one may not, for a valuable consideration, in relation to a *real transaction* concerning property, agree to indemnify another against a loss which would result, in case an embargo, or such a measure, should be adopted by the government. *Ibid.* 312.

50. An embargo does not render the performance of a contract, the execution of which it prevents, unlawful, but only suspends its execution. *Ibid.* 312.

51. Insurance was effected on the ship *Experiment*, at and from New-York to any ports on the north side of Jamaica, and at and from the same to New-York, with the usual warranties. The vessel was captured by a Spanish privateer, while proceeding from Falmouth, in Jamaica, to Montego Bay; recaptured by the British, carried back to Falmouth, and afterwards to Montego Bay, where the vessel and cargo were subjected to a salvage of one-eighth; sold, for the payment thereof; purchased by the captain, for the benefit of those whom it might concern; and the vessel, having completed her lading, returned to New-York, subject to a bottomry bond for advances made by the consignee; her outward freight having exceeded the salvage and expenses resulting from the recapture. The insured abandoned, on being informed of the recapture. The Court held, that there was no ground for an abandonment. *Queen et al. vs. The Union Insurance Company*, 331.

52. A capture as prize, will authorize an abandonment, as soon as notice is received, provided the loss continue to the time when the abandonment is made. *Ibid.* 331.

53. If a recapture is made with a view to salvage, and this does not exceed, with the expenses, one-half of the value of the property, and the recapture produces only a temporary interruption of the voyage, the insured cannot abandon. *Ibid.* 331.

54. If the recapture be as prize; or the voyage be lost, or not worth pursuing; if the salvage be very high; or if further expenses be necessary, and the underwriters will not agree to pay them, the assured may abandon. *Ibid.* 331.

55. Although the unseaworthiness of the vessel, occasioned by want of men, at the time the risk commences, may not vacate the policy, provided she is seaworthy when the voyage commences; yet she cannot go out of her course, after the commencement of the voyage, to supply such want. *Cruder vs. The Pennsylvania Insurance Company*, 333.

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56. Insurance on the freight of the *Hannah*, and from New-York to Wilmington in North-Carolina, thence to Barbadoes, and back to Philadelphia. At Wilmington, a cargo was prepared to be shipped in the *Hannah*, had she arrived there. The vessel was forced, by stress of weather, to put into Norfolk, and arrived there in a state of wreck. The agent of the plaintiffs gave notice to the defendants' agent at Norfolk, and requested him to have all the repairs made that were necessary; which he declined. The repairs would have cost upwards of 3000 dollars, at which sum the vessel was insured. The plaintiffs offered to abandon, and the vessel was sold for 325 dollars. *Hart et al. vs. The Delaware Insurance Company*, 346.
57. If the injury which the vessel sustained, exceeded one-half of her value, the insured had a right to abandon, unless the underwriters would agree, *at all events*, to pay for the repairs, though they should exceed what they were liable for, if only a partial loss had taken place. *Ibid.* 346.
58. The underwriters are not bound to make or direct the repairs, in any case; but if the injury sustained exceed one-half the value of the vessel, and if the underwriters would prefer the voyage being prosecuted, they must engage to pay what will be necessary to fit her for the voyage, though it should exceed the sum underwritten. *Ibid.* 346.
59. The refusal of the agent of the defendants to pay for such repairs only, as the defendants were liable for, and not for all the necessary repairs, authorized the abandonment. *Ibid.* 346.
60. Risk is the subject of the contract of insurance, and until the risk commences, the contract does not attach. *Ibid.* 346.
61. Generally, an inchoate right to freight does not commence until the cargo is put on board; but if the freight is insured in a valued policy, the right to indemnity attaches, if any part of the cargo is shipped. *Ibid.* 346.
62. If the insured, in virtue of a contract with a third person, has an inchoate right to freight as soon as the voyage commences, although before the cargo is taken in, there the risk commences, and the policy attaches, in virtue of the contract, as soon as the voyage commences. *Ibid.* 346.
63. The vessel insured was captured on her voyage to Carthage, and condemned on the ground of illicit trade, a part of the cargo having been brought from Spain to New-York by a Spaniard, entered for exportation, and afterwards sold to the plaintiff, the Spaniard going out as passenger on board the vessel, and the

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transaction being considered by the British Court of Admiralty as illegal, deeming it a trading between the mother country and her colonies. *Marshall vs. The Union Insurance Company*, 357.

64. If the jury considered that the assured was guilty of concealment of the shipment of the goods of Spanish origin, then the policies effected by the plaintiff will be void; for the taint of part of the cargo would occasion a seizure, detention, and expense, and give the assured a right to abandon. *Ibid.* 357.
65. The assured is not bound to anticipate every possible ground of suspicion which may, against right, weigh with the belligerent cruisers and Courts, and to communicate the circumstances; although, if against right, the belligerent Courts are in the habit of condemning property under particular circumstances, he should disclose the circumstances, if they exist, that the underwriter may know how to estimate the risk. *Ibid.* 357.
66. Insurance was made by R., a citizen of the United States, and a resident merchant of Philadelphia, on specie, from Cape François to Philadelphia, with a warranty of neutrality. Upon the happening of a loss, R. received from the defendants nineteen hundred and ninety-seven dollars, the amount of the specie shipped; but finding that of this sum, only eleven hundred and fifty-two dollars were his property, he returned the balance to the defendants, against whom afterwards the plaintiffs, resident merchants at Cape François, brought this suit for the money so returned by R. *Boudry vs. The Union Insurance Company*, 391.
67. The plaintiffs, being persons established and carrying on trade in a belligerent country, cannot recover against the defendants, even if the insurance had been made for their account, as there was no disclosure of their belligerent character, at the time of the insurance, which was so obviously material, as to avoid the policy. *Ibid.* 391.
68. In case of a total loss, the insurer loses precisely as much as the property insured was worth at the time and place of shipping it, the expenses of lading included. What the property cost the assured, is not the rule of value, in adjusting the loss; but what it was worth, or would sell for, when shipped. *Carson et al. vs. The Marine Insurance Company*, 468.
69. The invoice price is not a proper test of value. *Ibid.* 468.
70. In a valued policy, both the insurers and the assured agree; and therefore the assured is excused from proving, at the trial, the amount of loss. *Ibid.* 468.

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71. The rule for fixing the value of a vessel which has been lost, and which has been insured in an open policy, is to take the sum she was worth at the time of her departure, including certain expenses. *Ibid.* 468.
72. It is sufficient, on a question of seaworthiness, if the vessel was fit to perform the voyage insured, as to *ordinary perils*—the underwriters are bound as to extraordinary perils. *Watson et al. vs. The Insurance Company of North America*, 480.
73. If the insured lay a rational ground for the disability of the vessel, by proving severe gales during the voyage, and seaworthiness on a preceding voyage, the burthen of the proof of want of seaworthiness lies on the insurer. *Ibid.* 480.
74. *After*, when a disability happens from stress of weather, without any sufficient cause. *Ibid.* 480.
75. If a vessel, after she commences her voyage, becomes unfit to prosecute it, having been exposed to no extraordinary peril of the sea, this may authorize so strong a presumption of want of seaworthiness at her departure, as to require strong evidence from the assured to repel the presumption. *Cort et al. vs. The Delaware Insurance Company*, 375.
76. Where a vessel has, upon a report of a survey under an order given by the American consul, been sold by the captain, without a regular condemnation; the loss cannot be made total; but the assured is entitled to no more than the amount of loss actually sustained. *Ibid.* 375.

INTEREST. (MODE OF CALCULATION)

1. The correct general rule is to calculate interest up to the period when a payment is made, to which the payment should be first applied; and if it exceed the interest due, the balance is to be applied to diminish the principal; but if it is not sufficient to discharge the interest, the principal is not to be increased, by adding to it the balance of interest which may remain due, so as to produce interest upon interest. *Smith vs. The Administrators of Shau*, 167.
2. Where the plaintiff has stated an account upon a principle unfavourable to himself, as to the charge of interest, he ought to be bound by it. *Ibid.* 167.
3. There is no difference as to the application of the general rule, relative to calculating interest, to debts legally carrying interest, and to those where interest is given in the name of damages. *Ibid.* 167.

INTEREST. (MODE OF CALCULATION)

4. The rate of interest fixed by the law of Georgia, the contract having been made there, will be allowed in the Courts of the United States, although it may exceed the rate authorized by the law of the state, in which the Circuit Court holds its sessions. *Jafray vs. Dennis*, 253.

JUDGMENTS.

1. The true construction of the Acts of Assembly of Pennsylvania relating to the lien of judgments, is, judgments shall be enrolled when they are signed, and they shall not, by relation, affect bona fide purchasers or mortgagees; and as to such persons, the lien of the judgment creditor shall cease, unless revived in five years by *scire facias*. *Hurst vs. Hurst*, 69.
2. Lien, 2.
3. A judgment entered on a bond with warrant of attorney, was set aside, the defendant having, some months before the time of executing it, resided in this state, and describing himself in the bond, as late a resident of the state of Delaware. *Byrne vs. Holt*, 282.
4. If there was error in entering a judgment, the Court, at a subsequent term, cannot set it aside, unless it was entered by misprision of the clerk, by fraud, or the like. *Assignees of Medford vs. Dorsey*, 433.
5. Judgment on an award that the defendant pay so much on receiving from the plaintiff an indemnity against certain claims. The plaintiff afterwards refused to give the indemnity; and on the defendant paying more claims, against which he was to be indemnified, than the amount of the judgment, the Court ordered satisfaction to be entered on the judgment. *Medford vs. Dorsey*, 467.

JURISDICTION.

1. Davis M'Gee was indebted to the complainant, and after his decease, administration was granted to his effects in New-Jersey, to James M'Gee, the defendant, who, in his answer, stated that he had administered all the effects of the deceased, except 760 dollars, which he was ready to distribute; but claimed that he could be called upon to settle his administration account, only in the state of New-Jersey. The Court held, that the defendant, having stated that he had property in his hands, might be called upon, *in Equity*, to account for that property, anywhere. *Bryan et al. vs. M'Gee, Adm.* 337.
2. In a case removed by the defendant from the State Court to the Circuit Court, on the ground that the defendant was an alien, the damages laid in the writ exceeded five hundred dollars, and bail

JURISDICTION.

- to a much larger amount was given, which were held sufficient to give jurisdiction. *Muns vs. Dupont*, 463.
3. It has been frequently determined, that the damages laid in the declaration, give the jurisdiction as to the matter in dispute. *Ibid.* 463.
 4. The damages laid in the writ, and in the plaintiff's affidavit, are equally conclusive, as to the amount in controversy, for the purposes of jurisdiction. *Ibid.* 463.
 5. Action by Craig, a citizen of Kentucky, against J. P. a citizen of New-Orleans, and Cummings, a citizen of Pennsylvania, upon whom only the process was served, and *non est inventus* returned by the Marshal as to J. P. Cummings entered a plea to the jurisdiction, stating that J. P. was not a citizen of Pennsylvania, but was a citizen of New-Orleans; to which there was a general demurrer by the plaintiff.
- The defendant who has been served with process, cannot avail himself of the want of jurisdiction in the Court, as to a person who is severed from him, and is no longer to be considered a defendant in the cause. *Craig vs. Cummings*, 505.
6. The Sea Nymph and her cargo, were seized for a violation of the non-importation laws, by importing the goods seized into the port Philadelphia. The vessel and part of her cargo were seized in the river Delaware, and part of the cargo after it had been landed.
- The ninth section of the Judiciary Act of the 24th of September 1789, assigns to the District Courts jurisdiction of all cases, purely of admiralty maritime jurisdiction, if they arise under the laws of impost, navigation, and trade; where the seizure is made in waters navigable for vessels of ten tons burthen from sea. In all other cases, where the seizure is on land, or waters of less depth, the jurisdiction is on the common law side of the Court. *Clark vs. The United States*, 519.
7. An information *in rem* against the thing itself, in a case of admiralty and maritime jurisdiction, is not a suit at common law, but an admiralty proceeding, and does not require a trial by a jury. *Ibid.* 519.
 8. Informations *in rem*, on the admiralty side of the District Courts, for forfeitures incurred under the laws of impost, have been sanctioned by the Supreme Court of the United States. *Ibid.* 519.

KING OF SPAIN.

The Court refused to inquire, upon a motion, whether Ferdinand VII.

KING OF SPAIN.

King of Spain, could institute this suit, the government of the United States not having acknowledged him King. *The King of Spain vs. Oliser*, 429.

LIEN.

1. Judgments, 1.
2. The lien of a judgment which bound real estate, is not lost, if after a *testatum fieri facias* has been levied and returned, the plaintiff, in the writ, ordered further proceedings to be stayed. *Aliter*, if personal property is levied upon, and suffered to remain in the hands of the defendant in the execution. *Green et al. vs. Allen*, 280.
3. To constitute a lien by a factor for his balance, possession of the goods by him, and a right in the principal to the property on which the lien is to operate, are necessary. *Ryberg & Co. vs. Snell*, 403.

LUNATIC.

The Court refused to enter an *exoneretur* on the bail-piece, on the ground that the defendant was confined in the hospital, as a lunatic. *Bowerbank vs. Payne*, 464.

MARINERS' WAGES.

The seaman left the vessel at the Lazaretto, and after her arrival at Philadelphia he went on board, and did work by order of the mate. The captain afterwards promised to pay him his wages. It did not appear that an entry of desertion at the Lazaretto was made in the log-book, and no good cause for the nonpayment of the wages being shown, they were ordered to be paid. *Brig Betsey vs. Duncan*, 272.

MARSHAL.

After a rule on the Marshal to return the *capias ad satisfaciendum*, issued against the defendants, and the return of the Marshal, that the plaintiff had directed him not to serve the writ on one defendant, and that the other could not be found; the Court have nothing more to do with the rule.—If the Marshal has misconducted himself, the remedy is an action for a false return. *Segourney vs. Ingraham et al.* 336.

MASTER OF A VESSEL.

1. Evidence, 1, 2.
2. Bottomry, 1, 2.
3. Where the owners of a vessel have no agent in a foreign port, the

MASTER OF A VESSEL.

master has power to make a charter party. *Hurry vs. The Assignees of Hurry et al.* 145.

4. In cases of extreme necessity, the master may, in a foreign country, sell the vessel and tackle to prevent the property from perishing; but he cannot do this in the country where the owner lives. *Scull vs. Bridle*, 150.
5. Sale of Property, 1.
6. It is the duty of the master to put in a claim to property against which proceedings are instituted; and his failing to do so, may possibly affect the claim of the insured, under certain circumstances. *Marshall vs. The Union Insurance Company*, 452.
7. Regularly, the master is the agent of the ship owner only, and has nothing to do with the cargo, but for its safe keeping and transportation. The supracargo represents the owner of the cargo, and has nothing to do with the ship. *Ross vs. The Ship Active*, 226.
8. The master has full powers to bind the ship owner for the money he may borrow for the necessary purposes in a foreign country, where the owner is not present, and where the loan is exclusively for the interest of the owner; and if it cannot be obtained upon bills drawn on the owner, which he is bound to pay, he may pledge the ship, to repay the loan with maritime interest. *Ibid.* 226.
9. If the owner of the ship is also owner of the cargo, the master may sell part of the cargo, to raise money for necessary wants of the ship; and, if in no other manner the money can be obtained, and the loan is absolutely required for the success of the voyage, he may sell a part of the cargo of the ship, to whomsoever it may belong. *Ibid.* 226.
10. If the owner of the cargo is on board of a vessel, at the time of a disaster requiring that money shall be obtained by the master to enable the vessel to prosecute the voyage, he is not bound to advance funds, and if he does so, he is entitled to satisfactory security, and an extra and adequate compensation for the advance. *Ibid.* 226.
11. Such contracts will, however, be at all times carefully scrutinized, as the master may be more exposed to imposition in making them, than in a loan from a stranger. *Ibid.* 226.
12. H. being indebted to the plaintiffs, made a bill of sale of the ship John to them, to secure the amount of the debt, and went out in the ship as master, she being registered in the names of the plaintiffs. H. borrowed, for his own purposes, from the defendant, a sum of money; and, for his security, transferred to him the bills of lading of the cargo home, for the purpose of his being

MASTER OF A VESSEL.

- repaid the amount of the loan out of the freight, payable by the general shippers on board the vessel. *Keith et al. vs. Murdoch*, 297.
13. The captain, as *master*, has no right to pledge the freight, to raise money for his private purposes. As the agent of the owners, which the captain may be, in the absence of a consignee, he can act only for the benefit of his principal, and he has no other authority. *Ibid.* 297.
 14. If the captain were a mortgagor in *possession*, he might charge the freight; but if he acted as the master of the vessel only, when he charged the freight with his debt, as his possession was that of the mortgagees, the legal title continued in them, and he could not encumber the freight for his own debts. *Ibid.* 297.

MECHANICS' LIENS.

1. A purchaser at sheriff's sale, under a judgment on a lien, entered according to the Act of Assembly, relative to mechanics' liens, and having thus become the equitable owner of the property, cannot maintain an ejectment for the same. *Carson's Lessee vs. Boudinot*, 33.
2. *Ejectment* for the recovery of a building which had been purchased by the plaintiff at a sale made by the sheriff, under a lien, entered according to the Act of Assembly of Pennsylvania, securing to mechanics and others the value of materials furnished for the erection of houses, &c. *Ibid.* 33.
3. A mechanic who has erected a building on the ground of another, under an agreement with the owner to convey the same on ground rent, becomes the equitable owner of the building, and within the provisions of the Act of Assembly. *Ibid.* 33.

MESNE PROFITS.

1. The plaintiff can recover mesne profits, in the nature of damages, only from the time of the ouster laid in the declaration, having proved no title prior thereto. *Hyllon vs. Brown*, 165.
2. The value of the improvements made by the defendant, ought to be first set against the mesne profits prior to the actual ouster, and after the title of the plaintiff accrued; and the balance, only, can be properly deducted from the rents and profits to which the plaintiff is entitled. *Ibid.* 165.

MISNOMER.

1. Where a person called *Lebrun* and *Lebring*, was on board a vessel, as a seaman, and no person among the crew of the name of *Leber-*

MISNOMER.

- ing, the Court gave to the administrator of Lebering, the wages due for the services of the person so designated. *Kotland vs. The Administrator of Lebering*, 201.
2. A mere misnomer is not sufficient to exclude the record of such a judgment from being given in evidence, if, in point of fact, the party appeared by a wrong name, and instead of pleading the misnomer, went to issue on other points, and judgment was given against him. *Stevell vs. Joseph Read*, 274.
 3. An averment, in the action on the judgment that he is the same person, if made out by proof, will fix the liability of the defendant for the judgment. *Ibid.* 274.

NE EXEAT. (WRIT OF)

1. The District Judges of the Courts of the United States have no authority to issue writs of *ne exeat*. *Gernon vs. Bocaline*, 130.
2. The affidavit upon which this writ will issue, should be positive to a debt, or to the belief of the plaintiff, that a certain balance of account was due. *Ibid.* 130.

NEW TRIAL.

1. The Court granted a new trial, on the ground that new and material evidence had been discovered, which the Court deemed so important, as that the same should be submitted to the jury. *Marshall vs. The Union Insurance Company*, 411.
2. The Court refused to grant a new trial, because the defendant would, in the event of the same being granted, compel the plaintiff to submit to a nonsuit in consequence of a defect in the declaration, and thus defeat the justice of the case, unless the Court would allow the plaintiff to amend his declaration, and thus the granting of a new trial would be of no avail. *Gerbier vs. Emery*, 413.
3. Where, if a new trial should be granted, the defendant could not be allowed in the suit to make the set-off, which, by the weight of evidence he seemed entitled to, the Court refused to grant the same. *Ibid.* 413.

NONSUIT.

Variance, 1.

NOTICE.

Quere, Whether under the Act of the Assembly of Pennsylvania of 1705, relative to the sale of lands taken in execution, *personal notice* of the time and place of the sale should not be given by the sheriff. *Hurst vs. Rodney*, 49.

OBSTRUCTION OF PROCESS.

1. In the execution of a writ of *habere facias possessionem*, if adverse possession be held, the officer is first to turn out the occupant, and take possession in the name of the law; and, afterwards, deliver it to the plaintiff in ejectment. It is not necessary that the vacant possession shall be immediately delivered to the plaintiff. *The United States vs. Morrow Lowry et al.* 169.
2. The offence of obstructing process, consists in refusing to give up possession, or in opposing or obstructing the execution of the writ, by threats of violence, which it is in the power of the person to enforce; and thus preventing the officer from dispossessing the person so acting. *Ibid.* 169.
3. A mere threat to resist the execution of the writ, is not an offence under the Act of Congress; but if, when the officer proceeds with the writ to the land, and is about to execute his process, a threat is used, by a person forcibly retaining the possession, accompanied by the exercise of force, or having the capacity to employ it, and the officer does not do his duty; the offence is complete. *Ibid.* 169.
4. The officer is not obliged to risk or expose his person, or to proceed to a personal conflict with the defendant. *Ibid.* 169.

PAROL EVIDENCE.

Evidence, 3.

PARTNER AND PARTNERSHIP.

1. Payment, 1.
2. If two are jointly concerned in a particular adventure, the one authorized to dispose of the property, may appropriate the whole proceeds, to his own use, and make himself the debtor to the other for a moiety; or he may hold the money for the joint account, and subject his associate to all the risks which may attend it. *Hourquebie vs. Stephen Girard, Administrator*, 212.
3. If the connexion in a joint adventure terminate in the sale of the property, and one appropriates the proceeds to his own use, and and charges himself with the proportion due to his associate in the adventure, an action on the case will lie for the part owner for his portion. *Aliter*, if the connexion does not terminate with the sale, in which case, account rendered must be brought. *Ibid.* 212.
4. The plaintiff and the defendant were jointly concerned in an adventure to St. Domingo, which was placed under the management of the defendant, who commanded the vessel in which it was ship-

PARTNER AND PARTNERSHIP.

- ped, and who was to dispose of it on joint account. In a letter, addressed by the plaintiff to the defendant, before the vessel sailed, the plaintiff advised that the property should be sold for cash or produce. The defendant sold the property for bills on the French government, which, having been remitted by the plaintiff to France, were not paid. *Lyles vs. Styles*, 224.
5. This being a joint concern, the defendant had the power and the interest of a partner, as to the disposition of the cargo. *Ibid.* 224.
 6. The joint owner might advise, but he had no right to order; and the paper addressed by him to the defendant, was to be considered as advice only. *Ibid.* 224.
 7. If the conduct of the defendant was fair, in the transaction, he is not answerable to the joint owner for the loss sustained by taking the bills. *Ibid.* 224.
 8. Evidence, 19.

PATENT LAWS.

1. If the allegations and suggestions in the petition for a patent are substantially recited in the patent, it will be sufficient; but the omission to do this will invalidate it. *Evans vs. Chambers*, 125.
2. In an action for a violation of a patent granted by the United States for an alleged original invention, the plaintiff must satisfy the jury that he was the original inventor, in relation to every part of the world. *Dawson vs. Follen*, 311.
3. Although no proof was made, that the patentee knew that the discovery had been made prior to his, still he could not recover, if, in fact, he was not the original inventor. *Ibid.* 311.
4. The general law of patents declares, that the right to the patent belongs to him who is the first inventor, even before the patent is granted; and, therefore, any person, who, knowing that another is the first inventor, yet doubting whether he will apply for a patent, constructs a machine invented by another, acts at his peril, and a subsequent patent will prevent his use of the machine thus erected. *Evans vs. Weiss*, 342.

PAYMENT.

1. Where money belonging to A and C, arising out of a joint transaction between him and C, has, with the knowledge by B of the interest of A in the same, been placed by the agent of A and C to the credit of B and C, who are partners, and C is indebted to his partner B; B cannot apply the money of A to the credit of C, in satisfaction of his claim upon him. *Vanderwick vs. Summerl*, 41.

PAYMENT.

- 2. Twenty years creates a presumption of payment of a bond, if no interest has been paid in that time. If a shorter period is relied upon, the presumption should be fortified by circumstances. *Goldhawk, Executor of Nelson, vs. Duane*, 323.

PERILS OF THE SEA.

- 1. What constitutes a peril of the sea, is a question of law. *The United States vs. Hall*, 366.
- 2. The accident, which is attributable to a peril of the sea, must happen without fault or negligence in the master, and must occur at sea; or if on land, it must be *the immediate and necessary consequence* of a peril happening at sea. *Ibid.* 366.

PLEAS AND PLEADINGS.

- 1. Action of covenant upon an agreement under seal, by which the plaintiff stipulated to perform, in the Philadelphia and Baltimore theatres, for three years, and not to play or sing at any other theatre, without the license of the defendant; and the defendant agreed to pay the plaintiff so much per week, and to allow him the profits of a benefit and a half each season, provided the plaintiff kept and performed all his covenants, and not otherwise.

The defendant pleaded covenants performed, with leave to give in evidence every thing which amounts to a legal defence.

The defendant offered evidence to prove that the plaintiff had played at other theatres, without his license; and ill conduct on his part, which had produced riots at the theatre.

This plea, according to its import, and the understanding of the bar, amounts to an agreement that the defendant may give in evidence any thing which he might plead, and which, in point of law, can protect him from the plaintiff's claim. *Webster vs. Warren*, 456.

- 2. Where the covenants are dependent, the plaintiff cannot support his action as to them, without showing performance of every affirmative covenant on his part; and in such a case, it is competent to the defendant to prove a breach of such as are negative. *Ibid.* 456.
- 3. Where the covenants are independent, evidence, under the plea of covenants performed, with leave, &c., cannot be given, which amounts to a bar of the plaintiff's action, or to an offset of damages sustained by a breach of other independent covenants. Such evidence cannot be given in mitigation of damages. *Ibid.* 456.
- 4. Variance, 1.

PRACTICE.

- 1. The Court observed, that where accounts were referred to a Master.

PRACTICE.

- they would not settle principles previous to taking an account; but they must be brought before them on exceptions. *Vanderwick vs. Summerl*, 41.
2. Equity, 1.
 3. *Ne exeat*, (writ of) 1.
 4. Affidavit, 1.
 5. Courts, 2.
 6. Continuance, 1.
 7. Under a plea of payment, proof of the discontinuance of the suit cannot be given in evidence; and the defendant should have availed himself of the alleged discontinuance, before appearing and taking defence. *Latapée vs. Pecholier*, 180.
 8. By the practice and laws of Pennsylvania, any evidence may be given under the plea of payment, which proves that, *ex equo et bono*, the debt claimed ought not to be paid. *Ibid.* 180.
 9. If the debt has, in whole or in part, been paid; or has been extinguished by any means, as by a contract of a superior nature; or has been released; or if the debt be not in conscience due; or has by some means been satisfied, so that it cannot be conscientiously demanded; these facts may be given in evidence. *Ibid.* 180.
 10. Under which circumstances, the Court will stay proceedings of execution, until the defendant shall be protected from the danger of a double payment. *Ibid.* 180.
 11. Where, on a rule to show their cause of action, the plaintiffs have produced a positive affidavit of debt, the defendant cannot give evidence, that a suit for the same cause of action has been instituted in another Court. *Post et al. vs. Sarmiento*, 198.
 12. Where the replication denies all the allegations in the plea, the plea must be supported by evidence. *Gernon vs. Boeckelne*, 199.
 13. If an answer to any particular charge in the bill deny the same, it must be opposed by the plaintiff, by two witnesses, or by one and circumstances. *Ibid.* 199.
 14. A plea in avoidance of, and not responsive to the bill, stands for nothing as evidence of the facts stated in it. *Ibid.* 199.
 15. Bail, 1, 2.
 16. Where no declaration or plea has been filed, a rule to try or *non pros* cannot be enforced. *Sukisan vs. Browne*, 204.
 17. Where the plaintiffs had filed a new count to their declaration, to which no plea had been entered, the Court granted a continuance of the cause. *Le Roy et al. vs. The Delaware Insurance Company*, 223.
 18. The plaintiffs issued a commission to take testimony abroad, and

PRACTICE.

the defendant joined in the same, by filing cross-interrogatories; but the plaintiffs afterwards found a witness to prove the facts they desired to establish by the commission, and abandoned it. The Court said, a trial, under these circumstances, would be a surprise on the defendant. *Ibid.* 223.

19. The cause had been at issue for three terms, and the defendant asked leave to file a new plea, the effect of which would be to oblige the plaintiff to suffer a nonsuit. The defendant, before the suit was brought, refused to show his lease to the plaintiff, when, by so doing, he would have prevented the institution of the suit. The Court refused to permit the defendant to enter the plea, but upon his paying the whole costs of the suit. *Anonymous*, 270.
20. Judgments, 3.
21. Marshal, 1.
22. By the law and practice of Pennsylvania, if the sheriff return *non est inventus* as to one defendant, and service of the writ on the other, the plaintiff may proceed against the latter on a joint contract, stating in the declaration the return of the writ. *Craig vs. Cummings*, 505.

PRINCIPAL AND AGENT.

If the factor should dispose of goods, *bona fide*, which have been consigned to him, although the goods had not come into his hands, but the bill of lading has been actually transferred to the vendee, the right of the principal is defeated. But before the authority to sell has been exercised, the owner may countermand the consignment, or sell the goods while *in transitu*. *Ryberg et al. vs. Snell*, 403.

PRISONER.

The Court will not interfere with the jailer, who has custody of a prisoner under process, in the exercise of the discretion vested in him, as to the security of his prisoner; unless it appears that he has misconducted himself, by an abuse of that discretion, for the purposes of oppression. *Ex Parte Tinos*, 353.

PROCESS.

Obstruction of Process.

PROMISSORY NOTE.

1. If a bank note is divided, and one half of it lost, the *bona fide* holder of the half which is produced, is entitled to payment of its amount, on proving the loss of the other part, or accounting for the muti-

PROMISSORY NOTE.

- lated appearance of that which is produced. *Bullet vs. The Bank of Pennsylvania*, 172.
2. Upon the general principles of law, a man does not lose his right to real or personal property, or to choses in action, by losing the evidence of it. *Ibid.* 172.
 3. Such loss may be supplied by parol evidence of the contents of the paper, if it be the best evidence the nature of the case will admit. *Ibid.* 172.
 4. The payor of an instrument which passes by delivery, and which is alleged to be lost, may require the claimant to account for its loss; or if it be mutilated, to account for the same, and to prove that he came fairly into possession of it. *Ibid.* 172.
 5. The holder of the part which was lost, or stolen, and which may afterwards be found, takes it from the finder or the robber, subject to every defence which could have been legally made against the finder or robber. *Ibid.* 172.

PROSECUTION.

Witnesses for the defendant are never sent to the grand jury, but with the consent of the prosecution. *The United States vs. White*, 29.

PROTEST.

The protest of some of the crew, taken in the Isle of France, was permitted to be read in evidence, to invalidate their evidence given under a commission. *Winthrop vs. The Union Insurance Company*, 7.

PUBLIC MINISTERS.

1. The law is the same in the case of a defendant charged with an assault of a minister, as when charged with the same offence against a citizen; and if the minister gave the first assault, the defendant will be excused for the subsequent battery, though he was a minister. *The United States vs. William Liddle*, 205.
2. Evidence, 28.
3. Foreign Ministers, 1, 2, 3.

RECOGNISANCE.

1. An action of debt was instituted in the District Court, upon a recognisance entered into before an alderman of the city of Philadelphia, in a case in which a party was charged with having beaten a boy so as to cause his death, on board a merchant vessel of the United States, in the harbour of Flushing. The recognisance was

RECOGNISANCE.

in these words and figures: "July 22d, United States vs. Jasper. James Jasper and S. Dillingham, each tent in \$300, for the appearance of said Jasper," taken by me R. Wharton, and signed by the parties. The United States had judgment below, and the cause was brought, by writ of error, into the Circuit Court. *Dillingham vs. The United States*, 422.

2. In a recognisance, the material parts of the obligation and the condition, should be set forth in the body of it, so as to admit of extension, consistently with the terms of it. *Ibid.* 422.
3. It is essential to a breach of the condition of a recognisance, that the party who is to appear, should be solemnly called before his default is entered, and in an action on the recognisance, it should be clearly proved that the party was called and warned, and neglected to appear. *Ibid.* 422.

Query, if the non-appearance of the recognisor can be proved by parol evidence.

4. A material variance between the warrant and the recognisance set forth in the declaration, and that given in evidence, is fatal. *Ibid.* 422.

REGISTERING AND RECORDING SHIPS AND VESSELS OF THE UNITED STATES.

See case of *Peterson vs. The United States*, for principles decided in an information for violating this law, 36.

REFEREES.

1. The plaintiff filed a bill for relief, from a judgment entered on the award of referees, claiming to have certain credits allowed to him, which had not been given to him in the account stated and adjusted between him and the defendant, upon which the award was given. *Hurst vs. Hurst*, 127.
2. Plain mistakes in facts, which appear upon the face of the award, or which could be made out from the evidence laid before the referees, or for their examination; might have been taken advantage of by exceptions to the award; and these cannot afterwards be made the subject of a claim to relief in equity. *Ibid.* 127.
3. A report of referees, made under an order of Court, set aside, because of a plain and palpable mistake as to matters of fact, appearing by the evidence of the referees. *Knox vs. Walton et al.* 507.

RELEASE.

Where a release is given to one joint debtor, although under a misap-

RELEASE.

prehension of its operating to discharge the co-debtor, a Court of Equity will not relieve from it, unless where there was fraud or unfair practices. *Joy vs. Wurtz et al.* 266.

RETROSPECTIVE LAWS.

Ex post facto Laws, 1.

REVENUE LAWS.

1. C. and M. were jointly interested in vessels and cargoes, not as partners, but as joint owners in each adventure. The cargoes were shipped to the United States, C. being an alien, and M. a citizen; the vessels being registered by M. as American, and the cargoes appearing to be his property, and entered as such. This action was brought to recover a balance of account arising out of these transactions.

The cargoes were subject to foreign duties, and the transaction being a fraud on the laws of impost and tonnage, cannot be brought into our Courts for the purpose of enforcing a demand arising out of it. *Executors of Cambioso vs. The Assignees of Maffett*, 98.

2. A foreigner is not always bound to take notice of the revenue laws of a country to which he does not belong; and a firm and final contract, made in his own or a foreign country, is valid, although it may be intended to violate the revenue laws of a country with the property obtained from him by such contract, he not being acquainted with the intended fraud. *Aliter*, if the contract is to be completed in, or has a view to the violation of the laws of the country where it is to be executed. *Ibid.* 98.
3. A foreigner trading to the United States, is bound to know our revenue laws, and his ignorance of them will not exempt him from their influence. The property of Cambioso in the cargoes cannot be distinguished from his ownership of the vessels; as those cargoes were subject to foreign duties, being imported in vessels not entitled to an American register. *Ibid.* 98.
4. If any goods imported in these vessels were not subject to duties, their proceeds may be recovered; as the United States were not injured by their importation. *Ibid.* 98.

SALE OF PROPERTY.

1. A sale of the vessel and her tackle in Maryland, at auction, by the master, who, by misconduct, had got the vessel on shore, gives no title to the purchaser; and in an action of trover and conversion, for the articles purchased, the measure of damages is the

SALE OF PROPERTY.

real value of the property, and not what they were sold for.
Scully vs. Briddle, 150.

2. Bills of Lading, 1, 2, 3.

SALVAGE.

1. Salvage should always comprehend a reward for the risk of life and property, labour and danger in the undertaking, and should be so liberal as to afford a sufficient inducement to similar exertions to preserve the life and property of others. *Bond vs. The Brig Cora*, 80.
2. The only rule for the amount of salvage, is that which is dictated by a sound discretion, under the particular circumstances of the case. *Ibid.* 80.
3. Unless in cases of very extraordinary merit, or where the property saved is very large or very small, one-third has been the most usual rate of salvage. *Ibid.* 80.
4. The owner of the vessel, and not the freighter, is entitled to salvage, unless being on board at the time the property was saved, he consented to the same, and thus discharged the owner of the vessel from the responsibility incurred by deviating to save property. *Ibid.* 80.
5. A passenger who assisted in saving the property, is entitled to a portion of the salvage. *Ibid.* 80.
6. Distribution of the salvage among the persons entitled to it. The portions of salvage ought not to be so much regarded as the actual sum to be paid to the salvors. *Ibid.* 80.

SEAMEN'S WAGES.

Evidence, 26.

SET-OFF.

1. Unliquidated damages cannot be set off. *De Tulett et al. vs. Crousillat*, 132.
2. When the claim which is asserted as a set-off, depends for its validity on the generosity of the government, it cannot be enforced by this Court, against a legal demand upon the defendant by the United States. *The United States vs. Wells*, 161.
3. Damages which have not been ascertained, and are uncertain in their nature, cannot be made a matter of set-off. *Ibid.* 161.

SHERIFF'S DEEDS.

The Act of Assembly of Pennsylvania, passed the 26th of March 1785, which declares that no sheriff's deed, made *bona fide*, and for a

SHERIFF'S DEEDS.

valuable consideration, where quiet and peaceable possession has been had for six years, shall be adjudged defective for not producing any writ of *fiery facias*, &c., is a full answer to any objections founded on the process and its execution, under which the party acquired the title. *Lessee of Morrell vs. Craefe*, 380.

SPECIAL VERDICT.

Courts, 1.

STATUTE OF LIMITATIONS.

1. Any offer on the part of the debtor, operates to remove the bar of the statute of limitations, which fairly interpreted amounts to a promise to pay, or to an acknowledgment of the debt, or of some debt; as if the debtor says, "he will pay, if the demand is proved;" or a promise to account, though he adds, "that he owes nothing." *Read vs. Wilkinson*, 514.
2. If any thing is added which negatives a promise of payment, or an acknowledgment of a debt, it must be considered as qualifying every expression; as if A says he owes the debt, "but will not pay it, and will avail himself of the statute of limitations." *Ibid.* 514.
3. If a promise to pay a debt, barred by the statute of limitations, is conditional, the remedy for the recovery of the debt is not revived, unless the condition is performed. *Ibid.* 514.

STATUTES. (CONSTRUCTION OF)

1. Notice, 1.
2. Construction of the Acts of the Assembly of Pennsylvania, passed in 1772, and April 4, 1798, relative to judgments, and to their lien on real estate. *Hurst vs. Hurst*, 69.
3. Sureties, 1, 2.
4. The defendant was indicted for unloading from a vessel in the port of Philadelphia, three bags of coffee, without authority from the proper officer of the customs. The coffee was taken at night in a boat from the vessel, and part put on the wharf, the rest being in the boat; but on discovery, it was returned to the vessel. The Court decided that this was not a landing within the Act of Congress, of March 2d, 1799. *The United States vs. Smith*, 310.
5. The twenty-seventh section of the Act applies only to the captain or mate of the vessel. *Ibid.* 310.

STOPPAGE *IN TRANSITU*.

1. A summary of the law relative to stoppage *in transitu*. *Walter et al. vs. Ross et al.* 283.
2. The endorsement and delivery of a bill of lading, or the delivery of the bill without endorsement, if the cargo is, by the terms of it, to be delivered to a particular person, amounts to a transfer of the property, subject to the right of the vendor, if the consideration be not paid, to reclaim the property before it shall get into the actual possession of the vendee. *Ibid.* 283.
3. Goods sold, *bona fide*, while at sea, by assignment of the bill of lading, the right of the principal to stop *in transitu* ceases. *Ibid.* 283.
4. If goods be sold and shipped, upon the account and at the risk of the vendee, the bill of lading making the goods deliverable to him, or being assigned to him, transfers the legal title in the goods, to the perfection of which, nothing is wanted but actual possession. Until this be obtained, the vendor retains an equitable right to countermand the delivery of the goods, if the consideration has not been paid, and the consignee has in the mean time failed. *Ryberg & Co. vs. Snell*, 403.

SURETIES.

1. The sixty-fifth section of the Bankrupt Law of the United States, passed the 2d of March 1799, does not repeal the provisions of the laws of the United States, which give to the surety who pays bonds for duties, a preference over other creditors. *Mott vs. The Assignees of Maris*, 196.
2. The provisions of the Bankrupt Law except from its general operation, not only the preference of the United States, but also the right of preference for satisfaction of debts due to the United States. *Ibid.* 196.
3. P. paid a sum of money to the United States, as surety of S. in a bond for duties. S. became insolvent, and assigned his effects to Baker, who received four thousand dollars under the assignment, mixed the same with his own funds, and afterwards became bankrupt, and the defendants were appointed his assignees, but no effects, known to be part of the estate of S., came into their hands. The plaintiff claimed to have a preference and priority over the general creditors of Baker. *Pollock vs. Pratt et al.* 491.
4. Although the United States might, under the sixty-fifth section of the law to regulate the collection of duties, be entitled to claim of the defendants, to the amount which came into the hands of B., as the assignee of S., the provisions of the law do not extend

SURETIES.

to the surety who has paid the bond, the same rights and privileges. *Ibid.* 491.

TENDER.

1. A tender of debt and interest, without the proper expenses which a party has incurred in relation to the thing demanded, is not sufficient. *Baker vs. Parkeshorn*, 142.
2. If, when a party is about to tender a sum of money, the person to whom it is intended to pay it, declares he will not receive it, it is not necessary that the money should be actually produced. *Ibid.* 142.

TRUST AND TRUSTEE.

1. The general principle of equity is, that if a receiver, executor, factor, or trustee, lay out the money which he holds in his fiduciary character, in the purchase of real property, and take the conveyance to himself, he who is entitled to the money may follow the same, and consider the purchase as made for his use, and the purchaser as his trustee. *Phillips et al. vs. Crammond et al.* 441.
2. A resulting trust will arise, where lands have been purchased by one partner, and paid for out of the funds of the partnership. *Ibid.* 441.
3. The person entitled to the resulting trust, is not obliged to take the land, and to consider the purchaser as his trustee; but he may elect to take the money, and refuse the property. *Ibid.* 441.
4. Equity will not raise a use by implication, for a person who by law cannot hold it. *Ibid.* 441.

USAGE.

1. Evidence of a *usage* to explain some clause in a contract of insurance, is regular; but it can only be resorted to when the law is unsettled, and then the construction must be determined by the *usage*, and not by the opinions of witnesses. *Winthrop vs. The Union Insurance Company*, 7.
2. When the law upon a particular subject is settled, proof of a contrary *usage* cannot be admitted; such evidence being only allowed in doubtful cases. *Brown vs. Jackson*, 24.

VARIANCE.

The Court directed a *nonsuit* to be entered, because the evidence varied from the case stated in the declaration; the latter stating

VARIANCE.

the goods as belonging to the plaintiff, of which the defendant, as bailiff, was to make profit for him; and charging the defendant as receiver, by the hands of A, B, C, being the money of the plaintiff; and the evidence proved that the money received, was that of himself and his partners, and was received on joint account. *Jordan vs. Wilkins*, 482.

WARRANT OF ATTORNEY.

If the defendant insist upon it, the plaintiff's attorney must file his warrant. *The King of Spain vs. Oliver*, 429.

END OF VOLUME SECOND.

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